No. 22,204

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BENJAMIN GINSBERG,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLEE

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FILED

APR 25 1968

WM. B LUCK CLERK

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I N D E X

CITATIONS

Cases:

Cases (continued):

Statutes:

Internal Revenue Code of 1954:

Miscellaneous:

Federal Rules of Civil Procedure:

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BRIEF FOR THE APPELLEE

OPINION BELOW

The Findings of Fact and Conclusions of Law of the District Court (R. 190-201) are not officially reported.

JURISDICTION

This appeal involves federal wagering excise taxes for the second quarter of 1963 and wagering occupational taxes for the fiscal years ended June 30, 1962 through 1964, and is taken from a final judgment of the District Court in favor of the United States entered on April 21, 1967. (R. 203.)

The amounts involved are as follows (R. 25, 27, 89):

Nature of Tax	Period	Tax
Wagering excise tax	April, 1963 - June, 1963	$8,022.16
Wagering occupational tax	July 1, 1961 - June 30, 1962	87.68
Wagering occupational tax	July 1, 1962 - June 30, 1963	84.68
Wagering occupational tax	July 1, 1963 - June 30, 1964	81.68

The excise tax liability was satisfied to the extent of $4,795.96, and the wagering occupational tax in full from $5,050 seized by a special agent on June 6, 1964, incident to taxpayer's arrest. A notice of levy was served upon the special agent on July 1, 1964, to procure the funds pursuant to Section 6331, Internal Revenue Code of 1954. (R. 7, 79, 85, 86, 89, 92.) Taxpayer filed claim for refund of this sum on October 25, 1965 (R. 5), which claim was denied December 27, 1965 (R. 7). Within the time provided by Section 6532 of the Internal Revenue Code of 1954, on December 30, 1965, the taxpayer brought this action in the District Court for recovery of the $5,050. (R. 2-7.) On March 30, 1966, and April 21, 1966, involuntary payments were secured by way of levy against taxpayer in the amounts of $95.49 and $1,090.09, respectively (R. 79), leaving, as of July 22, 1966, an unpaid balance owed to the Government of $2,040.62 (R. 78-79, 89). For this sum the Government counterclaimed on July 22, 1966. (R. 78-80.) Jurisdiction was conferred on the District Court by 28 U.S.C., Section 1346. The judgment of the District Court was entered on April 21, 1967.

(R. 203.) Within sixty days thereafter, on June 19, 1967, a notice of appeal was filed (R. 223), a notice of motion for relief from judgment having been filed June 2, 1967 (R. 205-210), and an order denying motion for relief from judgment having been filed June 19, 1967 (R. 222). Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

QUESTIONS PRESENTED

1. Whether the District Court erred in granting the Government's motion for summary judgment when it became evident, as a result of pretrial discovery that there was not a single fact in dispute regarding the propriety and correctness of the federal wagering excise tax assessment here in issue.

2. Whether the District Court abused its discretion in denying taxpayer's motion for relief from judgment on grounds of alleged neglect or error by taxpayer's former counsel, where it appeared to the District Court that taxpayer could not have been more ably represented by anyone and that taxpayer's former counsel did not commit any act of neglect or error.

STATUTES AND RULES INVOLVED

The statutes and rules involved in this case are to be found in the Appendix, infra.

STATEMENT

The facts, as found by the District Court (R. 190-199), are as follows:

Prior to June 6, 1964, special agents of the Internal Revenue Service's Intelligence Division obtained from the rubbish can of the taxpayer mutilated wagering records in the handwriting of the taxpayer. These records were then reconstructed by the Government agents. (R. 190-191.)

On June 6, 1964, the special agents arrested the taxpayer for alleged violations of Sections 4401, 4411 and 7201 of the Internal Revenue Code of 1954. Incident to the arrest, $5,050 in United States currency was confiscated, along with other bookmaking paraphernalia belonging to the taxpayer. (R. 191.)

The federal grand jury on June 25, 1964, indicted taxpayer under Section 7201 of the 1954 Code of five counts of willfully attempting to evade or defeat the federal wagering occupational tax as imposed by Sections 4401, 4411 and 4412, Internal Revenue Code of 1954. (R. 191.)

Based upon the reconstructed wagering records of the taxpayer, the District Director, on June 30, 1964, made a jeopardy assessment against the taxpayer in the sum of $8,022.16 for wagering occupational taxes as required by 1954 Code Section 4401, plus other tax penalties, special taxes, and interest as imposed by 1954 Code Section 4411. Taxpayer's liability for taxes due and owing the United States is reflected on tax returns

prepared by revenue officers on behalf of the taxpayer under the authority of 1954 Code Section 6020(b). (R. 191.)

After various payments by the taxpayer, a subsequent adjustment of the taxpayer's tax liability, and application of the seized $5,050 to the taxpayer's account, the Government's records reflect that the taxpayer still is indebted to the United States for excise (wagering) taxes, interest and penalties in the amount of $2,223.70 as of March 10, 1967, plus interest thereafter as provided by law. (R. 191-192.)

For the purpose of applying the seized $5,050 in partial payment of the taxpayer's excise tax liability, which sum had been deposited in the official trust account of Special Agent Andrew Furfaro, a revenue officer, on July 1, 1964, served a notice of levy on Special Agent Furfaro, and on the Chief of the Cashier Section, Internal Revenue Service, directing them to deliver the $5,050 to the revenue officer for application to the taxpayer's excise tax liability account. (R. 192.)

The taxpayer filed a motion in the United States District Court to suppress the evidence obtained from his trash can by the special agents, and later reconstructed by them for use both in the criminal proceeding, and as a basis to compute the taxpayer's civil excise tax liability. In addition, the taxpayer moved the court for an order directing the District Director to return to him the seized $5,050. This motion was argued on July 9, 1964. (R. 192.)

By order dated July 22, 1964, United States District Judge Jesse W. Curtis ruled that except for the $5,050, all the evidence had been properly and lawfully seized, and therefore, taxpayer's motion to suppress the evidence was to be denied. As to the $5,050 confiscated during the arrest, the court felt it had been illegally seized, and ordered the Government to return same to the taxpayer. (R. 192.)

Subsequently, on the authority of Carlo v. United States, 286 F. 2d 841, 848 (C.A. 2d), certiorari denied, 366 U.S. 944; Field v. United States, 263 F. 2d 758, 762 (C.A. 5th), certiorari denied, 360 U.S. 918; United States v. Sica, No. 30435-CD (S.D. Cal.), and other cases which held that even if the court finds the money was illegally seized, once a jeopardy assessment and levy is made upon the funds in satisfaction of a tax obligation which the taxpayer owes the Federal Government, those funds may be used to satisfy that obligation, and need not be returned to the taxpayer, the Government brought a motion for the court to vacate that part of its July 22, 1964 order which directed the Government to return the $5,050 to taxpayer. (R. 193.)

Based upon this authority, the court, on November 6, 1964, entered a new order vacating that part of its July 22d order which had directed the Government to return the seized $5,050 to taxpayer. (R. 193.)

Taxpayer's criminal trial commenced on April 6, 1965. (United States v. Ginsberg, No. 33824-Crim., S.D. Cal.) Admitted

into evidence were the reconstructed wagering records which the revenue officers had previously used to compute the taxpayer's excise tax liability. On April 22, 1965, the jury found taxpayer guilty of all counts charged in the indictment. The same day his attorney, Marvin Zinman, made a motion for judgment of acquittal notwithstanding the verdict. This motion was taken under submission and continued until April 26, 1965. (R. 193.)

On April 26, 1965, the court stated that in its opinion, taxpayer was in fact engaged in the business of wagering, which would thus require him to pay the necessary fees and taxes. However, it felt that taxpayer had a bona fide belief that he was not in the business of wagering, and hence, could not form the requisite intent to "willfully" evade the payment of tax as required for a conviction under 1954 Code Section 7201. Upon this basis, the court granted the taxpayer's motion for acquittal notwithstanding the verdict. (R. 193-194.)

A "Final Demand" was served upon Special Agent Furfaro by a revenue officer on May 3, 1965, which demand was satisfied by Special Agent Furfaro removing said $5,050 from his trust account and delivering same to the revenue officer for application to taxpayer's excise tax obligations. (R. 194.)

On December 30, 1965, the taxpayer filed the instant complaint against the United States for the recovery of money wrongfully collected and seized. He contended in his complaint and claim for refund that the Government agents acted

without right or color of authority of any kind by seizing the $5,050, and that the Government's retention thereof was without right of any kind. (R. 194.)

With the court's approval, the Government, on July 22, 1966, filed a counterclaim against the taxpayer for the remaining excise tax liability of the taxpayer after application to his tax account of the seized $5,050 plus other payments made by taxpayer. (R. 194.)

On December 12, 1966, the taxpayer answered the Government's interrogatories, to wit (R. 194-195):

Interrogatory No. 3

> For the fiscal years 1962, 1963 and 1964, state with particularity every and all sources of your gross income.
>
> Answer: Betting and gambling.

Interrogatory No. 6

> For the fiscal years 1962, 1963 and 1964, if any of your gross income has been reported for tax purposes as derived from betting, state with specificity: a) the amount of each such bet; b) the subject matter of each such bet; c) the person or persons from whom you have received money as a result of such bets, including the telephone number and address of each.
>
> Answer: I do not recall any of the information requested in your question. I have no records which would enable me to do so. I kept my records on a daily basis and destroyed the same on each succeeding day.

By answers dated January 30, 1967, taxpayer responded to interrogatories and requests for admissions served upon him by the Government, to wit (R. 195-196):

Request for Admission No. 2

The Federal Excise Tax assessment made against Mr. Ginsberg for wagering which is the subject of this lawsuit is a proper and correct assessment.

Response: Deny.

Interrogatory No. 2

If your answer to Request for Admission No. 2 is other than an unqualified admission, state with particularity what you find objectionable with the assessment.

Answer: Said assessment does not accurately reflect the total volume on a net basis of plaintiff's activities.

This answer of January 30th prompted the Government's counsel to file a new set of request for admissions and written interrogatories. They were answered by taxpayer on February 6, 1967, as follows (R. 196-197):

Interrogatory No. 2

Your response to Interrogatory No. 2 filed with the Court on January 6, 1967, states that the assessment does not accurately reflect the total volume on a net basis of plaintiff's activities. With respect to the assessment, state with particularity:

a. What you perceive the total volume on a net basis of plaintiff's activities to be.

Answer: I have no opinion on that subject.

b. Describe in detail every document upon which you rely to substantiate the total volume on a net basis of plaintiff's activities.

Answer: None.

c. The name and address of every witness which you intend to use at time of trial to disprove the accuracy of the Government's assessment against the plaintiff.

Answer: I contend that the accuracy or not of the alleged assessment is not to be an issue at the

trial of this case, and accordingly, I do not intend to offer evidence on the subject. If it is ruled to be an issue in the case, I will be the only witness for the plaintiff on the subject.

d. Description of all other evidence which you intend to use in your case-in-chief at time of trial, not covered by your answers to Interrogatories 2(b) and 2(c) above shown, to disprove the accuracy of the Government's assessment against the plaintiff.

Answer: I do not intend to offer documentary evidence on the subject.

In response to further Government request for admissions and interrogatories, the taxpayer, on February 13, 1967, answered as follows (R. 197):

Request for Admission No. 1

The defendant's retention of the $5,050.00 was a correct, proper, and lawful retention.

Response: Deny.

Interrogatory No. 1

If your answer to Request for Admission No. 1 is other than an unqualified admission, state with particularity all facts upon which you claim that said retention was improper or unlawful.

Answer: Such money was not retained by defendant for any lawful, legitimate purpose other than to vex or harass the plaintiff; such retention did not have as its purpose the protection of the defendant's rights or the collection of taxes.

On March 6, 1967, the Government, through its counsel of record, Assistant United States Attorney Donald M. Fenmore, moved the court for an order compelling the taxpayer to further answer with particularity Interrogatory No. 2 filed on January 6, 1967, Interrogatory No. 2(a) and 2(d) filed on January 31, 1967, and

Interrogatories Nos. 1 and 2 filed on February 8, 1967; and in the alternative, if the taxpayer be either unwilling or unable to respond to the interrogatories served upon him by stating facts rather than mere legal conclusions, that taxpayer's complaint then be dismissed with prejudice, and that a deficiency judgment be entered against the taxpayer on the Government's counterclaim. (R. 198.)

United States District Judge Warren J. Ferguson, in response to this motion, ordered the taxpayer to "serve and file a further and as complete an answer as he is capable to Interrogatory numbers 2(a) and 2(d) filed by the defendant on January 31, 1967." (R. 198.)

Taxpayer's "further answer" of March 7, 1967, in compliance with the court order was (R. 198):

Interrogatory No. 2(a)

> * * * State with particularity what you perceive the total volume on a net basis of plaintiff's activities to be.
>
> Answer: I don't know.

In view of the fact that the taxpayer had already stated in his answers to the Government's interrogatories that with respect to the validity of the tax assessment, he did not intend to offer any documentary evidence on the subject, and that he did not know what the volume of his activities were during the period in question, the presumptive correctness of the Government's assessment necessarily must remain unrebutted. This being so, the Government, on March 15, 1967, filed a motion for summary judgment,

noticing the hearing for April 10, 1967, thus allowing the taxpayer approximately 26 days in which to prepare. (R. 198-199.)

On March 21, 1967, the taxpayer filed a memorandum in opposition to the motion for summary judgment. This memorandum failed to contain any opposing affidavit as required by Rule 56(e) of the Federal Rules of Civil Procedure and Local Court Rule 3(e)(4)(c), nor did it contain any statement of genuine issues which would set forth all material facts as to which it was contended there existed a genuine issue necessary to be litigated, as required by Local Rule 3(e)(4)(b). (R. 199.)

The failure by taxpayer to articulate a single fact he felt was left in dispute was pointed out to the court and taxpayer by Government's counsel in a reply memorandum filed March 28, 1967,-- 13 days prior to the hearing date. Throughout this 13-day period, taxpayer still did not state for the court any fact which he considered was left in dispute, nor did he do so during oral argument of the motion on April 10, 1967, or at any other time. (R. 199.)

On the basis of the foregoing facts, the District Court made the following conclusions of law (R. 200-201):

> V. The Government agents acted lawfully and within their statutory authority when they made the jeopardy assessment against the plaintiff, levied upon his fund of $5,050.00, and retained same for payment of the taxpayer's excise tax liability.
>
> * * * * *
>
> VII. One engaged in the business of accepting wagers cannot rebut the Government's wagering tax assessment against him on mere allegations that such assessment was arbitrary, excessive, invalid, and illegal. The assessment can be overturned only by the taxpayer producing records

and other evidence which clearly demonstrates the proper amount of tax which he owes the Government. Failing to produce such evidence, the Government's assessment is entitled to be reduced to judgment. O'Neill v. United States, 198 F. Supp. 367, 370 (E.D. N.Y. 1961).

VIII. Plaintiff could not produce one scintilla of evidence which tended in any way to rebut the correctness of the Government's assessment. Accordingly, the Government is entitled to a summary judgment against the plaintiff, to have the plaintiff's Complaint dismissed with prejudice, and to have a deficiency judgment against the plaintiff on its Counterclaim herein.

Pursuant to the foregoing, judgment was entered in favor of the United States on April 21, 1967. (R. 203.)

Thereafter, on June 2, 1967, the taxpayer filed a notice of motion for relief from judgment. (R. 205.) Taxpayer's affidavit which accompanied the notice of motion provided in pertinent part (R. 206):

I retained Marvin Zinman, attorney at law, to represent me in this action against the defendant for return of funds improperly levied upon as a result of an improper assessment made by the defendant.

In the course of the defense of the action, the Government propounded to me certain interrogatories and requests for admissions. On my former counsel's advice, I answered said interrogatories and requests for admissions in a manner which through inadvertance and neglect, gave the impression that I conceded the propriety of the filing of a return by the Government. All that was intended to be conceded by the answers was that I have engaged in gambling, not in receiving or accepting wagers in a manner which would make me liable for the payment of the gambling excise tax.

The interrogatories, the answers to which formed the basis for the order granting summary judgment, were ambiguous and referred to transactions which do not form the basis of liability for the gambling excise tax. My answers, through neglect and inadvertance, and in an attempt to be responsive to what were irrelevant and objectionable interrogatories, were used by the Government to confuse the true issue in this case, viz., the propriety of any return whatsoever being made rather than the accuracy of the return which was filed.

> Plaintiff should not be penalized and deprived of his day in court for neglect or error by his former counsel.

The Government filed "Opposition to Plaintiff's Motion for Relief from Judgment" (R. 212-214) and on June 19, 1967, Judge Ferguson ordered taxpayer's motion for relief from judgment denied, it appearing to the Court (R. 222):

> (1) The plaintiff could not have been more ably represented by anyone;
>
> (2) plaintiff's former counsel did not commit any act of neglect or error.

This appeal followed. (R. 223.)

SUMMARY OF ARGUMENT

The District Court here granted summary judgment pursuant to motion by the Government where it appeared, as a result of pretrial discovery, that the Government's assessment of the taxpayer's wagering excise tax liability was wholly undisputed. The District Court also denied taxpayer's motion for relief from judgment, finding taxpayer's allegation of neglect and error by his former counsel in regard to the handling of the admissions and interrogatories involved in reaching judgment wholly unwarranted.

This case arose out of the satisfaction of taxpayer's civil tax liability to the extent of $5,050 by means of funds levied upon by revenue officers pursuant to statutory authority in the Internal Revenue Code of 1954 while the funds rested in the trust account of special agents who had seized the funds incident to a prior lawful arrest of the taxpayer in connection with criminal proceedings. Taxpayer moved for return of the funds, but the District Court ultimately ruled that while these funds (but no other matter) had been illegally seized in connection with the arrest, they were nonetheless properly levied upon and accountable for satisfaction of taxpayer's civil wagering excise tax liability. 1/

1/ The civil tax liability was assessed subsequent to taxpayer's arrest for possible wilful (criminal) attempts to evade or defeat the federal wagering occupational tax as imposed by Sections 4401, 4411, and 4412, Internal Revenue Code of 1954 and based upon records that were not illegally seized.

Taxpayer challenges the granting of summary judgment of the District Court because he says it was never factually determined that his admitted betting and gambling activities were tantamount to being "engaged in the business of accepting wagers" as is required by statute. That this fact was in issue, however, was never once raised throughout almost a year's pretrial discovery activity. Suffice it to say that the pretrial discovery mechanism was introduced into the Federal Rules of Civil Procedure to take the guesswork out of trying cases.

Moreover Rule 56(e), Federal Rules of Civil Procedure, pertaining to summary judgment, affirmatively requires an adverse party who seeks to prevent the granting of a motion for summary judgment, to "set forth specific facts showing that there is a genuine issue for trial." This the taxpayer again failed to do either by memorandum and affidavit or at the hearing on the Government's motion. Indeed the taxpayer raised no factual dispute whatsoever concerning the propriety and correctness of the Government's assessment throughout the litigation. Under these circumstances, the Government was entitled to judgment as a matter of law.

The taxpayer's motion for relief from judgment was based on grounds of alleged neglect and error by his former counsel in not raising in discovery the issue heretofore mentioned. Naturally, as this Court has many times declared, such a question was directed to the sound discretion of the District Court which denied taxpayer's motion.

Former counsel not only was taxpayer's attorney throughout this litigation but successfully represented taxpayer in the prior criminal trial. If any attorney was familiar with the facts in this case, it was Marvin Zinman.

The District Court ruled that the taxpayer could not have been more ably represented by anyone and that taxpayer's former counsel did not commit any act of neglect or error. The ruling was clearly proper.

ARGUMENT

I

THE DISTRICT COURT CORRECTLY GRANTED THE GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT WHERE PRETRIAL DISCOVERY REVEALED NO FACT IN DISPUTE REGARDING THE PROPRIETY AND CORRECTNESS OF THE FEDERAL EXCISE TAX ON WAGERING ASSESSED AGAINST THE TAXPAYER

A. Introduction

Section 4401 of the Internal Revenue Code of 1954, Appendix, infra, imposes on wagers an excise tax equal to 10 percent of the amount thereof. 2/ The statute goes on to provide, at Section

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2/ For purposes of this chapter, Section 4421 (1) and (2), Internal Revenue Code of 1954 provides:

(1) Wager.--The term "wager" means--

(A) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers,

(B) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and

(C) any wager placed in a lottery conducted for profit.

(2) Lottery.--The term "lottery" includes the numbers game, policy, and similar types of wagering. The term does not include--

(A) any game of a type in which usually

(i) the wagers are placed,

(ii) the winners are determined, and

(iii) the distribution of prizes or other property is made, in the presence of all persons placing wagers in such game, and

(B) any drawing conducted by an organization exempt from tax under sections 501 and 521, if no part of the net

(continued)

4401(c), that "Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery."

Based upon the taxpayer's own bookmaking records, properly confiscated pursuant to the lawful arrest of June 6, 1964 (R. 191-192), the District Director of Internal Revenue on June 30, 1964, assessed against taxpayer a 10 percent federal excise tax on $61,005--this amount having been determined by the District Director to represent the gross amount of wagers accepted by taxpayer from April, 1963, through June, 1963. Added to the $6,100.50 tax was a penalty of $1,525.13 plus interest of $396.53 for a total federal excise tax assessment of $8,022.16. (R. 25, 31.) The excise tax return of taxpayer was prepared by the District Director pursuant to Section 6020(b) of the Internal Revenue Code of 1954. (See Appendix, infra.)

Under the provisions of Section 4411 of the Internal Revenue Code of 1954, Appendix, infra, there is " imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable." The Internal Revenue Code of 1954, Section 4901(c), Appendix, infra, provides that "All special taxes imposed by law shall be paid by stamps denoting the tax." Where

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2/ (continued)
proceeds derived from such drawing inures to the benefit of any private shareholder or individual.

the special taxes have not been duly paid by stamp at the time and in the manner provided by law, the Secretary or his delegate has the power to make the assessments.

Taxpayer failed to purchase the federal excise tax stamps required; the Government assessed the tax for the periods July 1, 1961 to June 30, 1962, July 1, 1962 to June 30, 1963, and July 1, 1963 to June 30, 1964. (R. 32-34.)

The taxes assessed were satisfied to the extent of $5,050, which sum was confiscated along with other bookmaking paraphernalia belonging to the taxpayer, incident to the arrest of June 6, 1964. The sum had been deposited in the official trust account of the special agent involved and on July 1, 1964, a revenue officer served a notice of levy on the special agent (and on the Chief of the Cashier Section, Internal Revenue Service), directing them to deliver the $5,050 to the revenue officer for application to the taxpayer's tax liability and it was finally so applied. (R. 191-192.) This application is consistent with applicable case law inasmuch as even though it is found, as it was here (R. 193), that the money was illegally seized, once a jeopardy assessment and levy is made upon the funds in satisfaction of a tax obligation which the taxpayer owes the Federal Government, those funds may be used to satisfy that obligation and need not be returned to the taxpayer. Welsh v. United States, 220 F. 2d 200 (C.A. D.C.); Field v. United States, 263 F. 2d 758 (C.A. 5th), certiorari denied, 360 U.S. 918; Simpson v. Thomas, 271 F. 2d 450 (C.A. 4th); Carlo v. United States, 286 F. 2d 841, 848-849

(C.A. 2d), certiorari denied, 366 U.S. 944.[3] Thus in order to recover the disputed funds it was incumbent upon the taxpayer to establish his non-liability for the tax involved. Welsh v. United States, supra; Field v. United States, supra; Simpson v. Thomas, supra; Carlo v. United States, supra.[4] This he did not do and, we submit, the District Court properly entered summary judgment against him.

B. The granting of the Government's Motion for Summary Judgment was correct according to law

The thrust of taxpayer's position on appeal is that the District Court erred in granting summary judgment where there remained unsettled the factual question of whether, as required by Section 4401, taxpayer was "engaged in the business of accepting wagers." (Emphasis supplied.) (Br. 4-8, 12.) Thus, he does not challenge the District Court's judgment as to the amount of the deficiency in issue, but the propriety of any determination of deficiency whatsoever. (Br. 5-6.)

3/ Taxpayer on July 9, 1964, moved for return of the money. (R. 192, Br. 3.) Based upon this authority, the District Court, on November 6, 1964, vacated its order of July 22, 1964, directing refund of the money. (R. 192-193.)

4/ Were it otherwise, these funds would receive an insulation offered no other property and in any event the property would be the proper subject of levy the instant released to the taxpayer. See, e.g., Field v. United States, supra. (R. 72-76.)

It is elementary that summary judgment is appropriate to give a speedy adjudication in cases which present no genuine issue of material fact and upon which the moving party is entitled to prevail as a matter of law. Rule 56(c), Federal Rules of Civil Procedure, Appendix, infra.

In determining the matter, resort is had to extrinsic facts, through affidavits, admissions and the like, in order to find out if there is a real issue. If these show that there is no issue, summary judgment will be granted despite the fact that the pleadings as they stand present such an issue. MacKay v. American Potash & Chemical Co., 268 F. 2d 512 (C.A. 9th); Byrnes v. Mutual Life Insurance Co. of New York, 217 F. 2d 497, 500 (C.A. 9th), certiorari denied, 348 U.S. 971.

In this case, the questions of what were the issues to be resolved by the District Court were determined by method of interrogatories and admissions. This is eminently correct and consistent with the purpose of discovery. United States v. Procter & Gamble, 356 U.S. 677, 682; Hickman v. Taylor, 329 U.S. 495, 499; Bell v. Swift & Co., 283 F. 2d 407 (C.A. 5th); Life Music, Inc. v. Broadcast Music, Inc., 41 F.R.D. 16, 25-27(S.D. N.Y.) The taxpayer served the Government with interrogatories on March 23, 1966, to which the Government filed answers on April 15, 1966. (R. 11.) The Government served interrogatories upon the taxpayer. The pertinent history of the interrogatories served upon the taxpayer is well summed up by the District Court (R. 194-198):

XV

On December 12, 1966, the taxpayer answered the Government's interrogatories, to wit:

Interrogatory No. 3

"For the fiscal years 1962, 1963 and 1964, state with particularity every and all sources of your gross income."

Answer: "Betting and gambling."

Interrogatory No. 6

"For the fiscal years 1962, 1963 and 1964, if any of your gross income has been reported for tax purposes as derived from betting, state with specificity: a) the amount of each such bet; b) the subject matter of each such bet; c) the person or persons from whom you have received money as a result of such bets, including the telephone number and address of each."

Answer: "I do not recall any of the information requested in your question. I have no records which would enable me to do so. I kept my records on a daily basis and destroyed the same on each succeeding day."

XVI

By answers dated January 30, 1967, Mr. Ginsberg responded to interrogatories and requests for admissions served upon him by the Government, to wit:

Request for Admission No. 2

"The Federal Excise Tax assessment made against Mr. Ginsberg for wagering which is the subject of this lawsuit is a proper and correct assessment."

Response: "Deny."

Interrogatory No. 2

"If your answer to Request for Admission No. 2 is other than an unqualified admission, state with particularity what you find objectionable with the assessment."

Answer: "Said assessment does not accurately reflect the total volume on a net basis of plaintiff's activities."

XVII

This answer of January 30th prompted Government's counsel to file a new set of request for admissions and written interrogatories. They were answered by Mr. Ginsberg on February 6, 1967 as follows:

Interrogatory No. 2

"Your response to Interrogatory No. 2 filed with the Court on January 6, 1967, states that the assessment does not accurately reflect the total volume on a net basis of plaintiff's activities. With respect to the assessment, state with particularity:

"a. What you perceive the total volume on a net basis of plaintiff's activities to be."

Answer: "I have no opinion on that subject."

"b. Describe in detail every document upon which you rely to substantiate the total volume on a net basis of plaintiff's activities."

Answer: "None."

"c. The name and address of every witness which you intend to use at time of trial to disprove the accuracy of the Government's assessment against the plaintiff."

Answer: "I contend that the accuracy or not of the alleged assessment is not to be an issue at the trial of this case, and accordingly, I do not intend to offer evidence on the subject. If it is ruled to be an issue in the case, I will be the only witness for the plaintiff on the subject."

"d. Description of all other evidence which you intend to use in your case-in-chief at time of trial, not covered by your answers to Interrogatories 2(b) and 2(c) above shown, to disprove the accuracy of the Government's assessment against the plaintiff."

Answer: "I do not intend to offer documentary evidence on the subject."

XVIII

In response to further Government request for admissions and interrogatories, the plaintiff, on February 13, 1967, answered as follows:

Request for Admission No. 1

"The defendant's retention of the $5,050.00 was a correct, proper, and lawful retention."

Response: "Deny."

Interrogatory No. 1

"If your answer to Request for Admission No. 1 is other than an unqualified admission, state with particularity all facts upon which you claim that said retention was improper or unlawful."

Answer: "Such money was not retained by defendant for any lawful, legitimate purpose other than to vex or harass the plaintiff; such retention did not have as its purpose the protection of the defendant's rights or the collection of taxes."

XIX

On March 6, 1967, the Government, through its counsel of record, Assistant United States Attorney Donald M. Fenmore, moved the Court for an Order compelling the plaintiff to further answer with particularity Interrogatory No. 2 filed on January 6, 1967, Interrogatory No. 2(a) and 2(d) filed on January 31, 1967, and Interrogatories Nos. 1 and 2 filed on February 8, 1967; and in the alternative, if the plaintiff be either unwilling or unable to respond to the interrogatories served upon him by stating facts rather than mere legal conclusions, that plaintiff's complaint then be dismissed with prejudice, and that a deficiency judgment be entered against the plaintiff on the Government's Counterclaim.

United States District Judge Warren J. Ferguson, in response to this Motion, ordered the plaintiff to " . . . serve and file a further and as complete an answer as he is capable to Interrogatory numbers 2(a) and 2(d) filed by the defendant on January 31, 1967."

XX

Plaintiff's "further answer" of March 7, 1967 in compliance with the Court Order was:

Interrogatory No. 2(a)

". . . State with particularity what you perceive the total volume on a net basis of plaintiff's activities to be."

Answer: "I don't know."

In view of the foregoing, the Government on March 15, 1967, filed motion for summary judgment. (R. 163-174.) 5/ The Government's assessment, which was the heart of the matter, stood presumptively correct and, as a matter of law, the Government was entitled to judgment (including its counterclaim). United States v. Rindskopf, 105 U.S. 418, 422; United States v. Molitor, 337 F. 2d 917, 922-923 (C.A. 9th); Roybark v. United States, 218 F. 2d 164 (C.A. 9th); United States v. Lease, 346 F. 2d 696, 700 (C.A. 2d); O'Neill v. United States, 198 F. Supp. 367 (E.D. N.Y.). At no time in the

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5/ Previously (Br. 6) and prior in time to the interrogatories' history above outlined, on July 1, 1966, the Government had moved for judgment on the pleadings (which would have been treated as a motion for summary judgment) on the grounds that the District Court's conclusions in the prior criminal trial as to the taxpayer's business activities, viz. (R. 29, 50-51), that their activities were insufficient for criminal conviction only because the requisite intent was lacking, were findings that were collaterally controlling for purposes of taxpayer's civil tax liability. The taxpayer having been acquitted, the District Court found the conclusions not here dispositive. The motion for summary judgment was denied. (R. 111-112.)

course of these comprehensive interrogatories did the taxpayer even suggest that his "betting and gambling" activities (supra) were not of the nature contemplated by Section 4401. At the time the interrogatories were served neither counsel nor taxpayer objected on the grounds that they were ambiguous. A reading certainly reflects the contrary. Each interrogatory was answered by taxpayer under oath. Even after court order to compel taxpayer to further answer the interrogatories as best and as complete as he was capable, taxpayer never once stated in his answer that the assessment was improper for the reason that he was not engaged in the business of accepting wagers. Only later, after judgment, [6] did he suggest that the interrogatories "were ambiguous" and that he had answered "in * * * inadvertance and neglect" if he had "conceded by the answers * * * that I have engaged * * * in receiving or accepting wagers in a manner which would make me liable for the payment of the gambling excise tax." (R. 206.)

We submit that the taxpayer should not here be permitted to thwart the very real and significant role of the interrogatories in this (and every) case. Discovery was carried on "to obtain the fullest possible knowledge of the issues and facts before trial" (Hickman v. Taylor, 329 U.S. 495, 501) to clarify and narrow the basic issues (Hickman v. Taylor, ibid.; Bell v. Swift &

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[6] See Point II, infra.

Co., 283 F. 2d 407 (C.A. 5th); Byrnes v. Mutual Life Insurance Co. of New York, 217 F. 2d 497, 500 (C.A. 9th), certiorari denied, 348 U.S. 971, and compare Life Music, Inc. v. Broadcast Music, Inc., 41 F.R.D. 16, 26 (S.D. N.Y.).

In addition, Rule 56(e), Federal Rules of Civil Procedure, Appendix, infra, specifically provides:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

And see S & S Logging Co. v. Barker, 366 F. 2d 617 (C.A. 9th).

The Government filed its motion for summary judgment on March 15, 1967, noticing the hearing for April 10, 1967, thus allowing taxpayer approximately 26 days in which to prepare. (R. 199.)

On March 21, 1967, the taxpayer filed a memorandum in opposition to the motion for summary judgment. This memorandum failed to contain any opposing affidavit as required by Rule 56(e), supra, and local court rules, nor did it contain any statement of genuine issues which would set forth all material facts as to which it contended there existed a genuine issue necessary to be litigated. (R. 199.) The failure by taxpayer to articulate a single fact he felt was left in dispute was pointed out to the taxpayer and to the court by the Government's counsel in a reply memorandum filed March 28, 1967--13 days prior to the hearing date. As the District Court pointed up (R. 199):

> Throughout this thirteen-day period, plaintiff still did not state for the Court any fact which he considered was left in dispute, nor did he do so during oral argument of the motion on April 10, 1967, or at any other time. 7/

Thus for taxpayer to argue that he has not been given his day in court hardly jibes with the facts of record and the position he takes seeks to subvert one of the most significant innovations of the Federal Rules of Civil Procedure, the pretrial discovery mechanism.

Taxpayer filed his complaint on December 30, 1965. Judgment was not entered until April 21, 1967--well over a year of difficult litigation. Ample opportunity was afforded taxpayer to raise any fact or issue. He raised none.

The court properly used the answers in the interrogatories to show no genuine issue of fact existed. It properly granted the Government's motion for summary judgment. Rule 56(e), Federal Rules of Civil Procedure; MacKay v. American Potash & Chemical Co., 268 F. 2d 512 (C.A. 9th); S & S Logging Co. v. Barker, supra; Alamo Theater Co. v. Loews, Inc., 22 F.R.D. 42 (N.D. Ill.)

7/ As set out more fully above, taxpayer stated that with respect to the validity of the tax assessment, he did not intend to offer any documentary evidence on the subject and that he didn't know what the volume of his activities was during the period in question.

II

THE TAXPAYER'S MOTION FOR RELIEF FROM JUDGMENT WAS ADDRESSED TO THE SOUND DISCRETION OF THE DISTRICT COURT AND WHERE THE RECORD CLEARLY SHOWED THAT TAXPAYER COULD NOT HAVE BEEN MORE ABLY REPRESENTED AND THAT PRIOR COUNSEL HAD COMMITTED NO ACT OF NEGLECT OR ERROR, THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING TAXPAYER'S MOTION

On June 2, 1967, taxpayer pursuant to Rule 60(b), Federal Rules of Civil Procedure, [8] filed motion for relief from judgment based upon the alleged neglect or error by former counsel. [9] He declared in his accompanying affidavit (R. 206):

> I retained Marvin Zinman, attorney at law, to represent me in this action against the defendant for return of funds improperly levied upon as a result of an improper assessment made by the defendant.
>
> In the course of the defense of the action, the Government propounded to me certain interrogatories and requests for admissions. On my former counsel's advice, I answered said interrogatories and requests for admissions in a manner which through inadvertance and neglect, gave the impression that I conceded the propriety of the filing of a return by the Government. All that was intended to be conceded by the answers was that I have engaged in gambling, not in receiving or accepting wagers in a manner which would make me liable for the payment of the gambling excise tax.
>
> The interrogatories, the answers to which formed the basis for the order granting summary judgment, were ambiguous and referred to transactions which do not form

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8/ Rule 60(b), Appendix, infra, provides:

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; * * *

9/ Mr. Zinman was also taxpayer's counsel in the criminal proceeding. (R. 193.)

ARGUMENT

APPELLEES' ANSWERING BRIEF

ANSWER TO ASSIGNMENT OF ERROR No. 1

THE TRIAL JUDGE WAS NOT REQUIRED TO DISQUALIFY HIMSELF.

POINT 1. Defendant Lenske previously secured disqualification of one trial judge and was not entitled to seek disqualification of another.

28 U.S.C. sec. 144, governing disqualification of judges because of personal bias or prejudice, expressly provides "a party may file only one such affidavit [stating facts and reasons for the belief that bias or prejudice exists] in any case." The statute "imposes a bag limit of one judge for a party to disqualify by the character of motion under consideration here." Martin v. Texas Indemnity Ins. Co., 214 F.Supp. 477, 480 (N.D.Tex., 1962), unreported in F.2d, cert. den. 377 U.S. 971 (1964).

On April 21, 1967, defendant Lenske stated in open court he intended to file an affidavit of prejudice against Judge Kilkenny, and that judge thereupon disqualified himself and transferred the case to Judge Belloni. (Tr.-I, pp. 24-25, 34: TDE 4/21/67). On May 15, 1967, he filed an affidavit of prejudice against Judge Belloni. (TDE 5/15/67).

Defendant Lenske's securing disqualification of Judge Kilkenny without actually filing a formal affidavit should not frustrate the rule that litigants may seek disqualification because of alleged bias only once during a case. See United States v. Hoffa, 245 F.Supp. 772 (E.D.Tenn., 1965), affirmed 349 F.2d 20 (6th Cir., 1965), affirmed 385 U.S.293 (1966) (judge refused to disqualify himself where prior judge voluntarily had withdrawn after a legally insufficient affidavit was filed). Judge Kilkenny's withdrawal from the case was in direct response to defendant Lenske's assertion he would file the affidavit against him. He should not be allowed to remove two judges merely because his first target did not insist upon the formality of the affidavit.

The disqualification statute must be strictly construed "due to its nature and the opportunity for abuse of the privilege * * * ." Scott v. Beams, 122 F.2d 777, 788 (10th Cir., 1951), cert. den. 315 U.S. 809 (1942). Accord: Marquette Cement Mfg. Co. v. Federal Trade Commission, 147 F.2d 589, 592 (7th Cir., 1945). Having secured removal of Judge Kilkenny, defendant Lenske was not entitled, under the statute, to seek disqualification of Judge Belloni.

POINT 2. The attempt to disqualify the trial judge was not timely.

The statute specifically requires a "timely" affidavit. "Nothing is more important in an affidavit than timeliness, and its counterpart, waiver." In re Union Leader Corp., 292 F.2d 381, 390 (1st Cir., 1961), cert. den. 368 U.S. 927 (1961). To avail himself of the statutory privilege, "the party concerned must complain promptly. He cannot be allowed to wait to see how the judge decides." Pacheco v. People of Puerto Rico, 300 F.2d 759, 760 (1st Cir., 1962).

Defendant Lenske knew of the assignment to Judge Belloni on April 21, 1967. (Tr.-I, pp. 33-34). Although trial was scheduled for the morning of May 16, 1967 (see Tr.-I, p. 2), he failed to file his affidavit until the day before. (TDE 5/15/67). Nothing explains or justifies the delay. C.f., Scott v. Beams, supra, 122 F.2d at 788, holding that the affidavit "must show a proper excuse for the delay."

The affidavit does not state defendant Lenske became aware of Judge Belloni's purported prejudice after the case was assigned to him. Moreover, it affirmatively asserts that a principal cause of the supposed bias, the so-called adverse newspaper, television and radio publicity, existed as far back as July, 1962 and lasted until March, 1967. (R, 64). Defendant Lenske's own recitations show his affidavit could have been filed promptly after reassignment of the case and, in all events, earlier than one day before trial. In these circumstances the affidavit was not timely. See Faubus v. United States, 254 F.2d 797, 804 (8th Cir., 1958), cert. den. 358 U.S. 829 (1958)(disqualification refused where all events cited in affidavit took place before September 10, and affidavit not filed until September 19, the day before scheduled hearing); Scott v. Beams, supra, 122 F.2d at 788 ("it must be filed with reasonable promptitude after the disqualifying facts are known").

POINT 3. The affidavit was legally insufficient.

Mere filing of an affidavit does not automatically disqualify a judge, for it must be legally sufficient. Berger v. United States, 255 U.S. 22, 32, 36 (1921); Price v. Johnston, 125 F.2d 806, 811 (9th Cir., 1942), cert. den. 316 U.S. 677 (1942). The statute requires statement of "the facts and the reasons for the belief that bias or prejudice exists * * * ." There is need of "'more than mere conclusions * * * .'" United States v. Bell, 351 F.2d 868, 879 (6th Cir., 1965), cert. den. 383 U.S. 947 (1966).

Assuming arguendo that, as alleged in the affidavit, defendant Lenske was indicted in federal court, that the Oregon State Bar proceeded against him, that news media carried publicity adverse to him, that the Bar sent unfavorable and unjust statements about him to Oregon's judges and that he was the subject of frequent judicial discussion, he failed to state facts indicating bias of Judge Belloni. There were no allegations this judge personally was aware of or involved in these matters; nor was there statement of reasons why he was prejudiced. It certainly does not follow that all judges hearing or seeing adverse comment about a litigant are going to be prejudiced against him. Compare United States v. Bell, supra at 877, observing that "the mere recitation of this publicity did not per se give the defendant a right to a continuance or a change of venue."

In order to disqualify a judge, the affidavit must show the bias is personal. Ferrari v. United States, 169 F.2d 353, 355 (9th Cir., 1948); Price v. Johnston, 125 F.2d 806, 811 (9th Cir., 1942), cert. den. 316 U.S. 677 (1942). Having failed to allege any act or statement on the part of Judge Belloni which even remotely could be construed as indicating his

personal prejudice, the affidavit was legally insufficient to warrant disqualification. Price v. Johnston, supra, 125 F.2d at 811 (affidavit insufficient because "statute requires that the bias or prejudice be 'personal.'").

ANSWER TO ASSIGNMENT OF ERROR No. 2

THERE WAS NO ERROR EITHER IN REFUSING TO HOLD FURTHER PRETRIAL CONFERENCE OR IN REFUSING TO RE-SET THE TRIAL DATE.

POINT 1. Defendant Lenske deliberately and voluntarily absented himself from scheduled pretrial conferences after receiving due notice thereof.

In March, 1967 a "firm date of April 24" was set for pretrial conference before Judge Kilkenny (Tr.-I, p. 33; TDE 3/27/67), but, with defendant Lenske's approval, it was changed to April 21, 1967. (Ibid). On that date, defendant Lenske appeared in Court (ibid); he promptly requested Judge Kilkenny's removal, and the case was reassigned to Judge Belloni for pretrial conference on April 24. (Tr.-I, p. 34; TDE 4/21/67). Defendant Lenske admits the Judge "was positive regarding the setting then * * * ." (Tr.-I, p. 26). On Sunday, April 23, defendant telephoned the Clerk from California, where he was vacationing, to advise that he would not appear for pretrial conference the next day. (Tr.-I, p. 34).

Mr. Lenske did not appear at pretrial conference known by him to be set for April 24. (Tr.-I, p. 27).

Pretrial conference was rescheduled for April 28. (Tr.-I, p. 35;

TDE 4/24/67). Notice of the date was sent to the parties (ibid), and defendant Lenske admits having received it (Tr.-I, p. 21), but he did not attend. Even if it is true he did not see the notice until the afternoon of April 28, after the morning pretrial conference, his absence should be deemed voluntary:

First. Had he attended court on April 24, rather than knowingly and deliberately leaving the state on vacation, there would have been no need to reschedule pretrial conference for April 28. Any alleged error in proceeding without him was therefore invited. "[C]ounsel may not invite error and then complain of it * * * ." Capella v. Zurich General Acc. Liability Ins. Co., 194 F.2d 558, 560 (5th Cir., 1952).

Second. It is manifest he would attend court at his whim and did not care whether pretrial conference was held on April 24, April 28 or any other date. He was content to forward a memorandum, which the Clerk delivered to Judge Belloni's clerk on April 24. (Tr.-I, p. 34). True, due process normally includes the right to be heard at hearings.

> "But this does not mean that every order entered without notice and a preliminary adversary hearing offends due process. The adequacy of notice and hearing respecting proceedings that may affect a party's rights turns, to a considerable extent, on the knowledge which the circumstances show such party may

be taken to have of the consequences of his own conduct." Link v. Wabash R. Co., 370 U.S. 626, 632 (1962).

It is undisputed he was told by the Clerk that the court probably would proceed without him if he were absent on April 24 and that his absence would be at his own hazard. (Tr.-I, p. 34). Since, in those circumstances, it undoubtedly would have been proper for the court to conduct pretrial conference on April 24 without defendant Lenske, it should be immaterial whether the court similarly proceeded on April 28, especially since the absence was a continuation of the initial willful departure. See Smith v. Stone, 303 F.2d 15, 18 (9th Cir., 1962), where this Court observed:

> "Counsel for litigants, no matter how 'important' their cases are, cannot themselves decide when they wish to appear, or when they will file those papers required in a law suit. Chaos would result. 'Attorneys should make an attempt to conform to the rules and not try to improvise new practice.' [citation omitted]. There must be some obedience to the rules of court; and some respect shown to the convenience and rights of other counsel, litigants and the court itself."

Third, Notification of the April 28 pretrial conference by means

of postal card notice was standard operating procedure of the Clerk's office. (Tr.I, p. 32). If defendant Lenske did not make arrangements to have it forwarded to him during his absence, that is his fault, not the Clerk's. Litigants are obliged to take notice of "the local rules governing assignment of cases, and to keep in touch with the progress of the case themselves, or through a local attorney." Janousek v. French, 287 F.2d 616, 622 (8th Cir., 1961). Compare Opinion No. 130, Oregon State Bar (1963) (an attorney "must be in a position to be contacted * * * by the courts" and violates his responsibilities as a lawyer if he "cannot be reached within a reasonable time by * * * courts * * *.").

In these circumstances defendant Lenske has no legitimate complaint. Since, as held in Link v. Wabash R. Co., 370 U.S. 626 (1962), the trial court has the right to dismiss an action sua sponte for failure of plaintiff's counsel to appear at pretrial conference when the case previously has been delayed, [1] it was not unreasonable for the court to proceed in his absence. Compare 3 Moore, Federal Practice para. 16.07, p. 1110 (2d ed., 1964) (noting that failure to appear at pretrial conference is justification for

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[1] This case, too, had been delayed. The original complaint was filed in June, 1965. (TDE 6/9/65). The first pretrial conference between defendants was not held until December 5, 1966 (TDE 12/5/66), followed by further pretrial conference on December 12, 1966. (TDE 12/12/66). On December 27, 1966, the parties were "placed under the rule" (TDE 12/27/66), which, under local practice, requires strict adherence to the time schedules of Local Rule 34. Perhaps this Court would take note that litigants customarily are placed under the rule only when the case has been unduly delayed and the court becomes satisfied that less formal procedures have not resulted in expeditious case administration. After the parties filed a supplemental proposed pretrial order and contentions (TDE 3/10/67, 3/16/67), the court set further pretrial conference for April 24 (TDE 3/27/67), and trial was set for the week of May 15. (TDE 3/27/67). The plan was to try the case almost two years after it began.

entry of default); Smith v. Stone, 308 F. 2d 15 (9th Cir., 1962) (affirming summary judgment against plaintiff where his counsel failed to attend hearing or to file required papers).

POINT 2. Defendant Lenske waived any objection by failing to seek timely relief.

Defendant Lenske knew of the April 28 pretrial conference no later than the afternoon of that day (Tr.-I, p. 22), but did not file a motion seeking further pretrial conference until May 12 (TDE 5/12/67), two weeks after the hearing and only four days before trial. For some reason he did not serve the motion on opposing counsel until the day before trial. (See Tr.-I, p. 27). Neither did he even attempt, between April 28 and May 15, to seek opposing counsel's consent to further hearing on matters he wanted to bring up at further pretrial conference. (Ibid).

The delay is inexplicable since defendant Lenske told the Clerk on April 28 he intended to file the motion and, at Lenske's request, special arrangements were made to accept it for filing on Saturday, April 29, a day the Clerk's office normally is closed. (Tr.-I, p. 35).

Even if the motion for further pretrial conference be regarded as a motion for relief under Rule 60 (b), Fed.R.Civ.Proc., that rule clearly requires the motion to be "made within a reasonable time," which is a matter "to be decided under the circumstances of each case." Delzona Corp. v. Sacks, 265 F.2d 157, 159 (3rd Cir.,1959). In view of the delay already encountered (see footnote 1, page 13 supra), the wilfullness of defendant Lenske's absence and the fact there was no legitimate reason for waiting

nearly to the eve of trial, the trial judge should not be found to have abused his discretion in the circumstances.

POINT 3. Defendant Lenske was not prejudiced by pretrial procedure nor by adherence to the scheduled trial date.

As observed by the trial judge (Tr.-I, p. 37), everything possible was done to protect defendant Lenske's interests in formulating the final pretrial order. At the April 28 pretrial conference, the court "required [Knutsens' counsel] to make a rather convincing presentation" even on proposed questions of fact and law which "seem[ed] obvious" to the court. (Ibid).

It is impossible to know with certainty what defendant Lenske would have argued had he bothered to show up. Assuming, arguendo, he would have raised the points set forth in pages 12 and 13 of his brief, the obvious answer is that, as shown in "Answer to Assignment of Error No. 5," pages herein, his positions are incorrect as a matter of law. He could not possibly be prejudiced by formulation of a pretrial order which set forth factual and legal issues which were appropriate under the law and which omitted matters inappropriate.

We call to the Court's attention the further fact that the trial judge allowed amendment of the pretrial order on the first day of trial by permitting inclusion of defendant Lenske's statute of limitations defense. (Tr.-I, p. 17). The extreme leniency of the court in having done so becomes apparent when it is recalled that the last pleading of the Knutsens was filed

in August, 1966 (TDE 8/5/66) and that defendant Lenske never raised the issue until May 15, 1967, the day before trial. (Tr.-I, pp. 13-14; TDE 5/15/67).

A litigant is not prejudiced when, as here, all deliberate effort is made to cast the pretrial order fairly and, as here, the order properly formulates the issues to be decided.

In view of the foregoing it was proper to adhere to the May trial date which had been scheduled in March. (Tr.-I, p. 33; TDE 3/27/67). A trial court "has broad discretion in the making of trial assignments and in holding parties to assignments reasonably made in the absence of valid grounds for continuance." Janousek v. French, 287 F.2d 616, 623 (8th Cir., 1961). There was no showing here why defendant Lenske could not go to trial on a date long-scheduled.

ANSWER TO ASSIGNMENT OF ERROR NO. 2 1/2

THERE WAS NO ERROR IN REFUSING TO ADMIT EXHIBIT 120.

Defendant Lenske's brief cites neither authority nor reason for his contention that refusal to admit Exhibit 120 was erroneous. Rejection of the document was proper for the following reasons:

First. It was irrelevant. The document was a copy of a contract of sale between Knutsens and people named Crawford, and it would tend neither to prove nor disprove any issues germane to the case. Defendant Lenske's stated purpose for introducing the exhibit was to impeach Knutsen's recollection that the contract price was $12,500 rather than $11,500. (Tr.-I, p. 110). Impeachment on collateral or immaterial matters is not permitted.

State v. McKiel, 122 Or. 504, 510, 259 Pac. 917 (1927).

Second. The exhibit was a copy (Tr.-I, p. 110) and, therefore, could not be admitted under the best evidence rule. ORS 41.610, 41.640.

Third. Paragraph VII of the Final Pretrial Order (R 67 at 72) and Local Rule 36, set out in Appendix "A," both required the parties jointly to identify and mark exhibits prior to trial, but, despite written request, the existence of which defendant Lenske never denied, he failed to meet with Knutsens' counsel for that purpose. (Tr. -I, pp. 110, 117).

ANSWER TO ASSIGNMENT OF ERROR No. 3

DEFENDANT LENSKE WAIVED HIS RIGHT TO JURY TRIAL.

The only issue triable by a jury timely demanded would have been Knutsens' claim for damages. All other issues concerned the parties' respective rights to title to real property and were equitable. Compare Johnson v. Gardner, 179 F.2d 114, 117 (9th Cir., 1949), cert. den. 339 U.S. 935 (1950), holding that suit to set aside deed because of fraud is equitable and there is no right to jury trial.

The damage claim was raised both by Knutsens' first and second amended answers and cross-claims, filed respectively on June 15 and August 5, 1966. (TDE 6/15/66, 8/5/66). Defendant Lenske's answer and cross-claim was filed August 15, 1966. (TDE 8/15/66). Since these were the last pleadings directed to the only issue triable by jury, and since defendant Lenske did not demand a jury until May 12, 1967 (TDE 5/12/67), there was total failure to comply with Rule 38 (b), Fed. R. Civ. Proc., which expressly requires

written demand for jury not later than ten days after service of the last pleading directed to the issue.

Failure to make timely demand resulted in waiver of right to jury. Rule 38 (d), Fed. R. Civ. Proc.; Tomlin v. Pope & Talbot, Inc., 282 F.2d 447, 448 (9th Cir., 1960).

Denial of defendant Lenske's motion was within the discretion of the trial court, id. at 449, and, as this Court approvingly has noted,

> "the view has been stated that as a matter of judicial administration discretion ought rarely to be exercised to grant a trial by a jury in default of a timely request for it." Ibid.

"[A]ppellate courts normally refuse to interfere" in these matters. Ibid. Particularly in this case, where demand for jury did not come until virtually the eve of trial, denial of relief from the waiver was proper. Compare McGowan v. United States, 296 F.2d 252, 256, n.7 (5th Cir., 1961).

ANSWER TO ASSIGNMENT OF ERROR No. 4

THE STATUTE OF LIMITATIONS DID NOT RUN.

POINT 1. Insofar as Knutsens sought to recover title to the property, the applicable statute of limitations provided for suit within ten years.

Knutsens' first cross-claim sought determination of their right to title to their farm as against defendants Lenske and Heddon. Under Oregon law the period of limitations was ten years. ORS 12.040(1) and 12.050. See Appendix "B."

True, one of the grounds for recovery of title was fraud. But the ten-year statute of limitations for recovery of title to real property, not the shorter period governing an action for fraud, nevertheless controls. See First National Bank v. Buckland, 128 Or. 242, 247, 273 Pac. 393 (1929). In all events, recovery of title also was predicated on lack of consideration for the deed. (Paragraph IV, Second Amended Answer and Cross-claim -- R 29; Knutsen Contention No. 3, Final Pretrial Order -- R 67). Findings of Fact No. 4 through 7 (R 77) were sufficient to establish Knutsens' right of recovery for these reasons which have nothing necessarily to do with fraud.

POINT 2. Knutsens' damage claim was not barred by the statute of limitations because they did not know of defendant Lenske's fraud more than two years before suit.

Oregon's general statute of limitation for actions based on fraud is two years, ORS 12.110 (1), but it is expressly provided that the limitation commences only from discovery of the fraud. Ibid; ORS 12.040(4). Both statutes are set forth in Appendix "B."

Finding of Fact No. 10, (R 77) that the Knutsens "did not discover or have reason to discover the fraud practiced upon them until 1965," means

that the second amended cross-claim, filed on August 5, 1966 (TDE 8/5/66), was timely. (Indeed, by reason of Rule 15 (c), Fed. R. Civ. Proc., the damage claim properly relates back to the original cross-claim of April, 1966. TDE 4/15/66).

This Court is bound by Rule 52(a), Fed. R. Civ. Proc. which requires that "findings of fact shall not be set aside unless clearly erroneous * * *." Lundgren v. Freeman, 307 F.2d 104, 113 (9th Cir., 1962).

In attacking the finding, defendant Lenske's brief makes much of the facts that Knutsen received a letter from Farmers Home Administration in May, 1962, advising that the property had been deeded to the Heddons, and that, shortly before May, 1963, Knutsen asked him for return of the property. The trial court properly concluded that such facts did not put Knutsens on notice of fraud for the following reasons:

First. The F.H.A. letter, of course, was no notice of Lenske's fraud of Knutsen because Knutsen knew that, at Lenske's suggestion, the property was supposed to be deeded to "a fictitious" person or straw-man. (Tr.-I, pp. 49, 62). Indeed, when he saw the letter, Knutsen "assumed then, and for quite some time after that, that the Heddons were the fictitious party that Mr. Lenske suggested * * *." (Tr.-II, p. 137). There was no reason for the letter to excite suspicion because its contents merely confirmed that Lenske had put into action the plan he suggested to his client.

Second. The Lenske-Knutsen conversation in May, 1963 did not involve a demand for return of title; it was a mere request. (Tr.-I, p. 64). Moreover, defendant Lenske did not refuse reconveyance at that time or otherwise indicate he would not comply; instead, he said he "would look into it." (Ibid). Lenske never denied this evidence. (See his testimony, Tr.-II, pp. 234-67).

The evidence supports the trial court's finding that there was no reason to know of the fraud until 1965. Knutsen testified that the next conversation he had with defendant Lenske regarding return of title was in January, 1965. (Tr.-I, pp. 57-58). On that occasion Lenske "either said he wouldn't or couldn't * * * ." (Id. at 58). None of this testimony was denied by defendant Lenske when he took the stand. (Tr.-II, pp. 234-67).

Knutsen's testimony is partially corroborated by Lenske's admission that they only discussed the matter twice -- once "during the Crawford period," presumably referring to 1963, and againwhen the United States Attorney's office insisted on reconveyance by Heddon. (Tr.-II, p. 256). Since the first conversation, as noted, was left on the basis that the Knutsens' attorney would look into the matter of a reconveyance, the client's first occasion to fear that something was wrong necessarily would have been when he later was told either that reconveyance could not or would not be effected.

Substantial corroboration of the court's finding and of Knutsen's testimony is in the fact that when Lenske declined reconveyance "that's when I stopped making payments on the property. That was the last payment I made on the property." (Tr.-I, p. 58). Exhibit 104, receipts from F.H.A., confirms that the last payment was on January 8, 1965. The reason for such cessation was obvious:

> "Q. Why did you cease making payments at that time, sir?
>
> "A. Because I was certain in my own mind that Mr. Lenske wasn't going to give me back title to the property, and I couldn't see paying -- I had the mortgage and Heddons had the property in their name, and I would be just buying property for

them." (Tr.-I, p. 59).

If the 1963 conversation with his attorney, Lenske, had been such to cause Knutsen, the client, to suspect fraud, it seems logical he would have done then what he did when he finally realized in 1965 what was happening, namely, cease payments so as not to continue building the wrongdoers' equity in the property.

It no doubt is true that the statute of limitations commences to run when a person is put on reasonable notice he has been defrauded; he does not have to have proof to point of demonstration. But, in this case there was every reason for Knutsen not to have been suspicious of defendant Lenske in 1963. (Tr.-I, pp. 64-65). After all, Lenske was Knutsen's attorney (Tr.-I, pp. 50-51) and acted as such over a period of years. (Tr.-I, p. 100). Knutsen never previously had an attorney. (Tr.-I, p. 47). There would be no reason at all for a client to fear, when his attorney says he will look into a matter, that the attorney was in the process of defrauding him. In view of the conventional notion that one's attorney can be trusted, defendant Lenske's implicit suggestion to the contrary is extraordinary.

Furthermore, when we consider the 1965 refusal to reconvey, it become apparent that defendant Lenske's 1963 statement he would look into a reconveyance clearly was an attempt to lull his client into a false sense of security. As noted, defendant Lenske did not deny these reassurances at trial. Indeed, if his testimony is to be believed, he continued as late as the 1965 meeting with his client to urge Knutsen to tell FHA and the United States Attorney's office "that there would be no problem involved so far as the property being reconveyed from the Heddons to him at the appropriate time, but in the meantime, it would have no bearing upon his continuance of occupancy, using it for farm purposes and making the payments." (Tr.-II, p. 251)

Lulling reassurances, especially from attorney to client, properly can be presupposed to outweigh the fact that the property was not promptly reconveyed upon first request. Compare Equitable Life & Casualty Ins. Co. v. Lee, 310 F.2d 262, 270 (9th Cir., 1962), where this Court affirmed the finding that, for purposes of the statute of limitations, there was no reason to know of fraud in view of reassurances by defendant's agent.

Given that the conveyance to the Heddons was pursuant to plan suggested by attorney Lenske; that, when reconveyance initially was requested, he assured Knutsen he would look into the matter; that Lenske claims to have reassured reconveyance as late as 1965 and that Knutsen properly should have nothing but the utmost confidence in his attorney, it is only reasonable that the trial court found as fact that there was no reason to know of the fraud until 1965. Notwithstanding defendant Lenske's contention that the evidence should be construed to show Knutsen's knowledge of Lenske's fraud as far back as 1962 or 1963, "we think that it would be for the trial court to consider its weight, as it considered the question of fact here involved" Hurley v. Southern California Edison Co., 183 F.2d 125, 130 (9th Cir., 1950)(affirming finding there was no reason to know of fraud in face of conflicting evidence).

There was no error in finding and concluding that the statute of limitations had not run.

ANSWER TO ASSIGNMENT OF ERROR No. 5

THERE WAS NO ERROR IN EXCLUDING FROM THE PRETRIAL ORDER CONTENTIONS OF DEFENDANT LENSKE IMPROPER UNDER APPLICABLE LAW AND/OR OTHERWISE WAIVED BY HIM.

INTRODUCTION

In Assignment of Error No. 5, defendant Lenske urges that the trial court erroneously excluded from the final pretrial order certain of his contentions. Before answering his argument, we call to the Court's attention that his fundamental contentions that Knutsen knowingly conveyed the property to the Heddons so that it could not be subjected to a lien for a greater amount of child support payments than Knutsen's ex-wife agreed to accept and so that it could serve as security for alleged fees and advances both were included in the pretrial order. Lenske admits that. (Lenske Br., 12).

POINT 1. The trial court properly exercised jurisdiction over Knutsens' first cross-claim.

The complaint filed by the United States sought foreclosure of the interests of Knutsens, Lenske and Heddon in certain real property, all of whom were named defendants. (R-1, particularly paragraphs 9, 10 and 12 and paragraph 4 of prayer for relief). Jurisdiction over the complaint was predicated on 28 U.S.C. sec. 1345, and defendant Lenske apparently concedes it was well founded. (Lenske Br., 2).

As will be discussed presently, Knutsens' cross-claims were brought under Rule 13(g), Fed. R. Civ. Proc. The first point to be made, however, is that if, as we contend, the cross-claims were of a type within the ambit of Rule 13(g), there was jurisdiction over the subject matter even though, as Lenske contends, he and the Knutsens both were citizens of Oregon. The rule recognized and applied in Glens Falls Indemnity Co. v.

United States ex rel. Westinghouse Electric Supply Co., 229 F.2d 370, 373-74 (9th Cir., 1956) is that jurisdiction over the subject matter of the original complaint "includes the power to adjudicate all matters ancillary to the particular subject matter" and that if a cross-claim properly comes with the limitations of Rule 13(g) and if there is jurisdiction over the original complaint "no independent basis of jurisdiction for the cross-claim * * * need be alleged or proved." This Court expressly followed the rule in L & E Co. v. United States ex rel. Kaiser Gypsum Co., 351 F.2d 880, 882 (9th Cir., 1965).

Since there need be no independent basis of jurisdiction over the cross-claim by way of diversity of citizenship or otherwise as long as the cross-claim came within Rule 13(g), the critical question is whether the Knutsen cross-claim did so. Rule 13(g) provides in relevant part:

> "(g) CROSS-CLAIM AGAINST CO-PARTY. A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action."

Since the United States sought to foreclose its mortgage on specified property, there should be no doubt that the cross-claims necessarily were ones "relating to any property that is the subject matter of the original action."

Knutsens' first cross-claim, seeking determination of their right to title as against co-defendants Lenske and Heddon, even has judicial precedent antedating the Federal Rules. See Mathis v. Ligon, 37 F.2d 635

(10th Cir., 1930), reh. den. 39 F.2d 455 (10th Cir., 1930). In that case plaintiff brought suit to cancel a deed running from the State of Oklahoma to defendant Mathis. 37 F.2d at 635. The Court of Appeals upheld Mathis' cross-claim against his co-defendants wherein he sought to establish validity of the deed as between him and the co-defendants.

Regardless of that precedent, the 1946 amendment to Rule 13(g), adding the language sanctioning cross-claims "relating to any property that is the subject matter of the original action," seems specially to have been designed to take care of situations such as existed here. The Note of the Advisory Committee on the Federal Rules pointed out:

> "The amendment is to care for a situation such as where a second mortgagee is made defendant in a foreclosure proceeding and wishes to file a cross-complaint against the mortgagor in order to secure a personal judgment for the indebtedness and foreclose his lien." Quoted at 3 Moore, Federal Practice, para. 13.01, p. 7 (2nd ed., 1964)

Knutsen was in substantially the same situation as the second mortgagee referred to by the Advisory Committee. Like the junior lienor, he was made defendant to a suit of foreclosure and desired to assert a claim against co-defendants establishing that, with respect to the precise land involved in the original complaint, his rights were superior to those of the co-defendants.

The practical necessity of allowing a defendant to a foreclosure proceeding to litigate his right to title as against a co-defendant becomes apparent when it is remembered that the very nature of a foreclosure proceeding requires such determination:

First. It was necessary to determine the right to overplus, if any, resulting from judicial sale of the mortgaged property. ORS 88.080 requires that "a decree of foreclosure shall order the mortgaged property sold." The government's foreclosure decree, which shows on its face that it was stipulated to by defendants Knutsen and Lenske, properly provided that any overplus of sale proceeds "be paid to the Clerk of this Court for the benefit of the defendants above named as their interest may appear." (R-42 at 43).

Second. It was necessary to determine, as between defendants, who had the right of redemption. ORS 23.560(1) provides in relevant part:

> "The mortgagor or judgment debtor whose right and title were sold, or his heir, devisee or grantee, who has acquired by inheritance, devise, deed, sale, or by virtue of any execution or by any other means, the legal title to the property sold, may, at any time within one year after the date of sale, redeem the property; * * * ."

The decree appropriately recognized the right of redemption. (R-42 at 44). Without determination of the relative rights of Knutsens, Lenske or Heddon, it would have been impossible to know which of them was entitled to seek redemption.

The self-evident purpose of Rule 13(g) is "to avoid circuity of action and to dispose of the entire subject matter arising from one set of facts in one action, thus administering complete and even handed justice expeditiously and economically. [The rule is] remedial and should be liberally construed." Blair v. Cleveland Twist Drill Co., 197 F.2d 842, 845 (7th Cir., 1952). Given a situation where a foreclosure decree necessarily

must provide for sale of the mortgaged property, it only makes sense that co-defendants to the foreclosure suit be allowed to litigate in that proceeding any outstanding questions of their relative rights to title, for otherwise it is impossible to know which of them is entitled to enjoy the right to overplus and the right of redemption, both of which are necessary concomitants of the principal decree itself.

In these circumstances, Knutsens' proceeding by cross-claim to establish their title as against co-defendants not only came within the literal requirements of Rule 13(g), but within its manifest purpose as well.

POINT 2. The trial court properly exercised jurisdiction over Knutsens' second cross-claim.

Defendant Lenske contends, however, that even if the trial court had jurisdiction over the cross-claim seeking recovery of title, it should have confined itself to that issue and not entertained the second cross-claim which sought damages. (Lenske Br., 12).

One justification of the damage cross-claim is that, within the meaning of Rule 13(g), it arose "out of the transaction or occurrence that is the subject matter * * * of the original action * * * ." This may seem startling at first, because of a natural tendency to assume that Knutsen's having given a note and mortgage to F.H.A. was the transaction which was the subject of the original complaint. It must be remembered, however, that:

> "'Transaction' is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the

immediateness of their connection as upon their logical relationship."

Moore v. New York Cotton Exchange, 270 U.S. 593, 610 (1926).

Moreover, since the test of the same "transaction or occurrence" under Rule 13(g), is identical with the test under Rule 13(a), Benson Mfg. Co. v. Bell Telephone Co., 35 FRD 29, 33 (E.D.Pa., 1964), it is pertinent to recall this Court's observation that "in deciding what is a transaction, we take note that the term gets an increasingly liberal construction" and that "two bundles of facts seldom are identical for comparing 'transactions' * * * ." Albright v. Gates, 362 F.2d 928, 929 (9th Cir., 1966)(allowing defendants in slander action to counterclaim not only against plaintiff, but to bring in additional defendants to the counterclaim on theory that the counterclaim, seeking damages and rescission of sale of securities, arose out of same transaction which was the subject of the alleged slander).

With these interpretations of "transaction or occurrence" in mind, we suggest that in this case the "occurrence that is the subject matter * * * of the original action," within the meaning of Rule 13(g), was Knutsens' default by failing and refusing to make payments to F.H.A. The complaint clearly alleged that "defendants Magner Dale Knutsen and JoAnne Click have violated the terms of said promissory note and of said mortgage in that they have failed, refused and neglected to pay the installments on said note * * * ." (R-1, at 2, para. 6). But for such failure there would have been no cause of suit. The undisputed evidence was that Knutsen wholly stopped making payments to F.H.A. in January, 1965, immediately after Lenske told him he either could not or would not reconvey, and that the reason for cessation of payments was Knutsen's unwillingness to be buying property for the man

who, he discovered, had defrauded him. (See page 21, supra).

We therefore submit that when the occurrence which is the subject matter of the original complaint is default in making loan payments, and when such default directly results from a co-defendant's fraud, there is sufficient connection between the two to render it entirely proper under Rule 13(g), to cross-claim against the co-defendant for damages resulting from fraud.

It also is proper to sustain the damage cross-claim by reason of the fact that, within the meaning of Rule 13(g), it was one "relating to any property that is the subject matter of the original action." The damage claim "related to" the property which was the subject of the government's complaint because it was based upon fraudulent deprivation of title to that property.

There is no reason, as defendant Lenske's brief suggests, to construe the "relating to any property" clause of Rule 13(g) as limiting the court's power to determination of interest in the property:

First. The draftsmen of the 1946 amendment clearly anticipated that, in addition to determining co-defendants' relative rights to property, the courts were to be enabled to award money judgments. Thus, the Advisory Committee's note on the amendment states that its purpose was to allow persons such as a second mortgagee "to file a cross-complaint against the mortgagor in order to secure a personal judgment for the indebtedness and foreclose his lien." Quoted in 3 Moore, Federal Practice, para. 13.01 p. 7 (2nd ed., 1964)(Emphasis supplied). If a second mortgagee is able to secure "a personal judgment" when the property may well have stood only as partial security for the co-defendant's debt giving rise to the judgment, we submit that it is proper to allow a party to secure a personal judgment

when the co-defendant's fraudulent manipulation of that property is the sole cause for the judgment.

Second. Restriction of cross-claims only to adjudication of interests in the subject property flies in the face of what we assume to have been deliberate use of the phrase "relating to." Had the Advisory Committee or the Supreme Court intended to promulgate a rule as narrow as that for which defendant Lenske contends, all they had to do was say so.

Third. Rejection of the second cross-claim would be wholly at variance with the purpose of Rule 13(g) which, among other things, was intended "to avoid circuity of action * * * ," Thomas v. Malco Refineries, Inc., 214 F.2d 884, 886 (19th Cir., 1954) and to provide for expeditious and economical administration of justice. Blair v. Cleveland Twist Drill Co., 197 F.2d 942, 945 (7th Cir., 1952). Compare this Court's statement that the purpose of the companion Rule 13(a) "is to prevent multiplicity of litigation and to bring about prompt resolution of all disputes arising from common matters." Local Union No. 11, I.B.E.W. v. G. P. Thompson Electric, Inc., 363 F.2d 181, 184 (9th Cir., 1966). With the limited exception that there had to be proof of the quantum of damages, and that certainly was not a complex matter, every fact necessary to establish the second cross-claim was proved during establishment of the first cross-claim. Since, as observed at page 27 , supra, practical necessity required Knutsens to assert their first cross-claim, it would be unmitigated waste of time, effort and money to force them into state court on their second claim where they would have to relitigate all the issues of the first claim.

> "Our courts should be vitally concerned
> to see to it that disputes between
> parties be resolved in as few lawsuits

as possible in as few courts as possible."
Shelley v. The Maccabees, 191 F.Supp.
742, 746 (E.D.N.Y., 1961).

Fourth. A corollary to the third point is that, having brought their first cross-claim, the Knutsens may well have been required to assert in the same proceeding their second cross-claim lest they be held to waive it. Relatively recently the Supreme Court recalled "'the whole tendency of our decisions * * * to require a plaintiff to try his * * * whole case at one time * * * .'" United Mine Workers v. Gibbs, 383 U.S. 715, 726, n.13 (1966). Both claims arose from the same set of facts, and for that reason it certainly would not be surprising that if the second claim had been brought in the state court defendant Lenske could have argued with some force that causes of action had been split.

POINT 3. The trial court had jurisdiction to award exemplary damages.

One point urged by defendant Lenske in support of Assignment of Error No. 5 is that "the court has no jurisdiction to determine the issue of punitive damages." (Lenske Br., 13). There is no argument or citation of authorities. It usually is unsafe to guess what opposing counsel has in mind, but lack of appellees' opportunity to respond to further elucidation of the point in appellant's reply brief prompts us to note that a similar point is made under Assignment of Error No. 6. At page 14 of his brief, defendant Lenske argues that equity courts may not award exemplary damages. If that is what he meant by the assertion there was lack of "jurisdiction" to do so, we elect to respond here.

Choice of Governing Law

It is first necessary to decide whether federal or state law will determine the existence or non-existence of "jurisdiction" to award exemplary damages. The statement by this Court that Rule 2, Fed.R.Civ.Proc., providing for "one form of action," does not abolish "the substantive distinction between law and equity," Straley v. Universal Uranium and Milling Corp., 289 F.2d 370, 373 (9th Cir., 1961)(emphasis supplied), might initially raise the thought that, in view of cases such as Erie Railroad v. Tompkins, 304 U.S. 64 (1938), determination of the supposed "jurisdiction" issue must be made with reference to Oregon law. However, the ultimate question here is whether a specific type of legal relief -- exemplary damages -- will be denied merely because the claimant also sought equitable relief. That is a question, we submit, which is governed by federal law.

First. If we are correct, as discussed under the heading "The Federal Rule," infra, that the Federal Rules of Civil Procedure do not permit denial of exemplary damages merely because equitable relief also was sought and granted, there can be no doubt that such federal law would govern. This, we suggest, is the clear teaching of Hanna v. Plumer, 380 U.S. 460 (1965). That case admonishes all federal courts that, given a situation covered by the Federal Rules, but which seemingly requires a conflicting result because of a state rule,

> "the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the

Enabling Act nor constitutional restric-

tions." 380 U.S. at 471.

The case requires that "in the event of such conflict, the Rules shall control." 1A Moore, Federal Practice, para. 0.306 [1], p. 3216 (2nd ed., 1965 Supp.).

Second. It has been held that the very idea for which defendant Lenske contends, that exemplary damages are incompatible with equitable principles, "appears, largely, as an outgrowth of the procedural separation [between law and equity] rather than as an independent substantive rule." I.H.P. Corp. v. 210 Central Park South Corp., 16 App.Div.2d 461, 228 N.Y.S.2d 883, 887 (1st Dept., 1962), affirmed 12 N.Y.2d 329, 239 N.Y.S.2d 547 (1963). In affirming, the Court of Appeals observed that challenge of the award of exemplary damages had come "not as a matter of the law of damages but rather on the procedural ground * * * ." 239 N.Y.S.2d at 548. If the courts were correct that the chancellors' apparent historical reluctance to award exemplary damages essentially grew out of the procedural separation between law and equity, then, even without need of Hanna v. Plumer, it should be clear that decision of the ultimate question must be governed by the Federal Rules. Such reluctance, having a procedural origin, presumably would not be within the ambit of the "substantive distinction between law and equity" referred to in the Straley case, and, accordingly, there would be no need to fear that even the pre-Hanna line of Erie cases would compel consideration of state law.

For these reasons, we commence with consideration of whether the Federal Rules of Civil Procedure permit a federal court to grant equitable relief and exemplary damages.

The Federal Rule

The contention that equity courts cannot award exemplary damages overlooks the nature of these proceedings and the fundamental approach of the Federal Rules.

Under the Rules "(1) there is no longer a law side and an equity side of the court; (2) there are no longer actions at law and suits in equity; (3) there is a 'civil action' in which all relief must be obtained that could formerly be secured at 'law,' in 'equity,' or under the 'hybrid' procedure * * * ." 2 Moore, Federal Practice, para. 2.02 [2], pp. 308-09 (2nd ed., 1965). "The federal decisions are in complete accord that there is no longer a law side nor an equity side to a federal district court * * * ." Id. at para. 2.10, p. 457.

Straley v. Universal Uranium and Milling Corp., 289 F.2d 370, 373 (9th Cir., 1961) flatly recognizes that "legal and equitable remedies may be administered in the same forum and in the same action * * * ." Compare this Court's more recent statement that, under the Federal Rules, "the same court may try both legal and equitable causes in the same action." DePinto v. Provident Security Life Ins. Co., 323 F.2d 826, 835 (9th Cir., 1963), cert. den. 376 U.S. 950 (1964).

These propositions flow directly from the Federal Rules. E.g., Rule 2 provides "there shall be one form of action to be known as 'civil action;'" Rule 8(a) establishes that "relief * * * of several different types may be demanded;" Rule 8(e)(2) authorizes a party to "state as many separate claims * * * as he has * * * whether based on legal [or] equitable grounds * * * ;" and Rule 18(a) makes clear that "a party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join * * * as many claims, legal [or] equitable * * * as he has against an

opposing party."

Because of this authority, defendant Lenske's citation of United States v. Bernard, 202 Fed. 728 (9th Cir., 1913) is inappropriate. That case was decided a quarter of a century before adoption of the Federal Rules and, we respectfully submit, is wholly out of harmony with present concept of the federal courts. See Youngs Drug Products Corp. v. Dean Rubber Mfg. Co., 362 F.2d 129, 134-35 (7th Cir., 1966)(unfair competition action where plaintiff sought and recovered injunctive relief, general damages and $200,000 punitive damages). The court expressly considered the argument made here by defendant Lenske, rejected it and held the trial court had power to grant all the relief.

The Bernard case explicitly based its decision on the idea that "by applying to a court of equity for relief, the complainant waives all claim to vindictive damages." 202 Fed. at 732. Aside from the fact, to be discussed presently, that the notion of waiver is incompatible with the Federal Rules, it does not form a logical basis for holding that equitable relief necessarily precludes exemplary damages. As succinctly pointed out in I.H.P. Corp. v. 210 Central Park South Corp., 16 App.Div.2d 461, 228 N.Y.S.2d 383, 888 (1962), affirmed 12 N.Y.2d 329, 12 N.Y.S.2d 547 (1963), the waiver theory

> "is the least substantial of the attempted justifications. In the absence of words or conduct by a party which manifest an intention to waive any of his remedies, it merely begs the question to hold that a waiver has resulted from a mere

asking for equitable relief. A party cannot reasonably be deemed to have waived a remedy unless he seeks others, knowing they are exclusive. But whether they are exclusive is the very issue here to be resolved. Nor is there any good reason, except that of historical accident, why one should be compelled to elect between two inadequate remedies."

If the waiver theory of the Bernard case still has vitality, then the portions of Federal Rules 8(a), 8(e)(2) and 18(a) quoted at page , supra, are rendered meaningless. We submit that those rules, which plainly permit joinder of claims and demands for both equitable and legal relief, can only be read as putting an end to the thought that a party seeking equitable relief automatically waives his right to a type of legal relief to which he otherwise would be entitled.

We ask this Court to rule that the Bernard case must give way to the purpose and letter of the Federal Rules, "for, as is well understood, the one civil action under the rules is used to vindicate any civil power the district court has * * * ." Fanchon & Marco, Inc. v. Paramount Pictures, Inc., 202 F.2d 731, 734 (2nd Cir., 1953)(per Judge Clark). Compare Rule 54(c), Fed.R.Civ.Proc., requiring that, except in default cases, "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled * * * ." This provision "assures a party of all relief, whether it would have been legal or equitable under the prior procedure, of which his

action as litigated shows him deserving." 6 Moore, Federal Practice, para. 54.62, p. 1207 (2d ed., 1965).

The whole question was fully explored in the I.H.P. Corp. case, cited previously. Although it was a state decision, the opinions in both the Appellate Division and the Court of Appeals are highly instructive because they emphasize the very points which are the basis of today's federal procedure. Thus, commenting on the assertion that "a court of equity has no power to award punitive damages," the Appellate Division stated:

> "This presupposes that courts still sit exclusively either as equity or law courts and cannot act in both roles at the same time in the same case. By statute, however, legal and equitable causes of action may be joined in the same complaint. * * * * In sum, the plea that an equity court lacks power to award punitive damages does not answer the question whether a modern-day court, empowered and directed to dispense both equitable and legal relief in the same action, may award punitive damages, and also grant a permanent injunction.
>
> * * * *
>
> "It is thus apparent that

> the rule which forbids combination of equitable relief with an award of punitive damages is founded upon an obsolete procedural division with no rational basis, apart from history, in modern substantive law or equity. If the facts warrant, it may be entirely appropriate to grant an injunction or another form of equitable relief and also exact punitive damages as a deterrent against flagrantly unlawful conduct, whether embraced within an injunction or not. Such freedom to grant whatever judicial relief the facts call for is entirely consonant with substantive legal and equitable prin-- ciples and with present-day concepts of procedural efficiency." 228 N.Y.S.2d at 886, 888.

Although it may be that, historically, equity courts, as such, did not award exemplary damages, the Federal Rules and the decisional authorities cited have the necessary consequence that the Knutsens, by stating a claim warranting an equitable remedy, did not irrevocably turn the federal trial judge into a chancellor for all purposes and thereby deprive him of power to award further relief appropriate under the law.

The Oregon Rule

Although the federal rule authorized the award of punitive damages

below, and although defendant Lenske has cited no Oregon authority to the contrary, it is well to note that, as nearly as counsel for the Knutsens can determine, the Oregon Supreme Court has not decided the issue.

Of some assistance is Stott v. J. Al Pattison Lumber Co., 95 Or. 604, 188 Pac. 414 (1920). Although it is true that the precise question was not discussed in the opinion, there can be no doubt that the court affirmed treble damages for willful cutting of trees thereon.

Held v. Kennedy, 77 Or. 526, 151 Pac. 968 (1915) implicitly recognizes the propriety of exemplary damages in equity. That was a suit to rescind a contract. Although the court disapproved the trial court's award of exemplary damages, it did so on the sole ground that "there is nothing in the pleadings or the evidence to justify such judgment." 77 Or. at 528. The case cited by the court for its authority dealt only with the need to plead malice or willfulness. Sullivan v. Oregon Railway and Navigation Co., 12 Or. 392, 406 (1885). Fair implication, therefore, is that had the pleadings alleged and the evidence shown the requisite malice, the court would have upheld the exemplary damage award in the equity suit. Accord: Hodel, The Doctrine of Exemplary Damages in Oregon, 44 Or. L. Rev. 175, 198 (1965).

There is no inherent reason why a so-called equity court could not grant exemplary damages if they otherwise were proper. It is well established under Oregon law that

> "'a court of equity, having jurisdiction of the subject matter of a suit or having acquired jurisdiction over some portion of the controversy, will proceed to decide the whole issue and award complete relief, although the rights of the parties

are strictly legal and the final remedy is of a kind that may be granted by a court of law.'"

Emrich v. Emery, 216 Or. 88, 95, 332 P.2d 1045 (1959)(emphasis supplied). Thus, "it is always appropriate in a decree in a suit in equity to provide for a money judgment which may be warranted under the issues and the evidence." Esselstyn v. Casteel, 205 Or. 344, 374, 288 P.2d 215 (1955).

In view of these cases, there is no reason to suppose that the Oregon Supreme Court would disapprove the award in an equity suit of exemplary damages which would have been proper in an action at law.

The trial court was correct; it had the power to award exemplary damages.

POINT 4. Defendant Lenske's claim based on Knutsen's alleged fraud in an entirely different transaction was properly eliminated from the case.

On page 13 of his brief, defendant Lenske refers to a claim he purportedly had by reason of Knutsen's allegedly having defrauded Lenske. (So there can be no mistake, we categorically deny the gratuitous recitations of supposed facts set forth in his brief). He contends that the trial court erred in excluding the claim from the case and cites Rule 13(b), Fed.R.Civ. Proc. which provides that "a pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim." (emphasis supplied).

As comparison of Rule 13(b), referring to "counterclaim * * * against an opposing party," with Rule 13(g), referring to "cross-claim * * * against a co-party," makes plain, defendant Lenske could not file a Rule 13(b) permissive counterclaim against his co-party, Knutsen.

> "Rule 13 makes a distinction between opposing parties and co-parties. Claims between co-parties are denominated cross-claims, and are limited to claims arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein, or relating to property that is the subject matter of the original action. Thus, a defendant does not have an unlimited right to plead any and all claims that he may have against a co-defendant; but his right is unlimited as to claims against a plaintiff, the opposing party, since this type of claim is regarded as a counterclaim." 3 Moore, Federal Practice, para. 13.18, p. 48 (2nd ed., 1965).

Nor could his alleged claim satisfy the requirements of Rule 13(g), pertaining to cross-claims. There were no allegations even remotely sufficient to connect his claim either with the transaction, occurrence or property that were the subject matter of the original action. Moreover, the evidence itself showed that he was complaining about a transaction concerning an entirely different piece of property than that involved in the case. (Compare

Tr.-II, p. 140, lines 19-22, with p. 142, lines 18-23; and Ex. 102 with Ex. 110).

Since the claim in question neither qualified as a counterclaim under Rule 13(b) nor as a cross-claim under Rule 13(g), there was no error in refusing to include it in the pretrial order.

POINT 5. There was no error in excluding from the case defendant Lenske's contentions that Knutsen came into equity without clean hands and that, as a condition of obtaining equitable relief, Knutsen should have first offered to pay for Lenske's alleged legal services.

Clean Hands Doctrine

Defendant Lenske's brief does not say wherein he believes the Knutsen's came into court without clean hands. The only clue in the brief is the reference to the alleged fraud of Knutsen, discussed in Point 4, supra.

Even assuming, solely for purposes of argument, that Knutsen was guilty of fraud as charged, it will be remembered that the transaction allegedly so tainted was different from the one giving rise to the Knutsens' cross-claim against Lenske. See page 42 , supra.

Defendant Lenske's point has no merit because the clean hands doctrine "is confined to misconduct in regard to, or at all events connected

vith, the matter in litigation * * * ." Platt v. Jones, 149 Or. 246, 259, 38 P.2d 703 (1934); Wilson v. Parent, 228 Or. 354, 370, 365 P.2d 72 (1961) "in respect to the matter as to which he seeks relief").

Doctrine of Claimant Doing Equity

The doctrine that he who seeks equity must do equity concerns itself with the willingness of a claimant to do those things which the court equires him to do. See Leighton v. Hawkins, 236 Or. 638, 642, 389 P.2d 460 1964)("He also has submitted himself to the jurisdiction of a court of equity nd therefore must himself be prepared to do equity.")(emphasis supplied); umstein v. Stockton, 199 Or. 633, 643, 264 P.2d 455 (1953)("When a plaintiff brings suit * * * he submits himself to the jurisdiction of equity and must imself do equity as required by the court.")(emphasis supplied). Accordingly, he doctrine may not be understood to punish a claimant for his alleged shortcomings prior to trial, and the suggestion that Knutsen should have offered to ay attorney fees (Lenske Br., 13) is without merit.

In view of defendant Lenske's failure to cite any authorities, we re at a loss to know on what grounds the court should or could have decreed hat the Knutsens pay attorney fees to Lenske before they could obtain equitable elief from his fraud upon them. There are compelling reasons why no such rder could be entered:

First. As long as we are concerned about the doing of equity, it s pertinent to note that the first time in the entire litigation that defendant enske ever disclosed what he wanted by way of attorney fees was on the econd and last day of trial. (Tr.-II, p. 248). Neither his answer and cross-laim (R-33), nor any of his contentions (R-45), nor his "additional answer" R-65) give even a hint either as to the amount he sought or the method by vhich it could be determined. Efforts to make inquiry of defendant Lenske

prior to trial proved abortive when he declined to testify upon deposition because of fear of self-incrimination. (See Tr.-I, p. 42). He invoked the same constitutional privilege when called as an adverse witness on the first day of trial. (Tr.-I, pp. 39-41). He even refused at trial to answer the question whether he had been Knutsen's attorney. (Tr.-I, p. 39). Since, even under the liberal policies of the Federal Rules, a plaintiff is required to "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests," Conley v. Gibson, 355 U.S. 41, 47 (1957), it just does not make sense for a person found to have committed fraud to be able to insist upon his victim's paying him when the wrongdoer frustrates every attempt of the victim to secure notice of what is demanded of him.

Second. Compelling Knutsen to pay attorney fees under the guise of requiring him "to do equity," as a practical matter, would be the same thing as permitting defendant Lenske to obtain a cross-claim for those fees. At least with respect to such portion of the fees as were not attributable to services "relating to" the property sought to be foreclosed, any such relief rather clearly would be beyond the scope of Rule 13(g), discussed earlier.

Third. Insofar as defendant Lenske would have had Knutsen pay fees for services in connection with the subject property, Findings of Fact Nos. 4-8, and especially Finding No. 9 (that Lenske defrauded Knutsen), dispose of his claim. "'Fraud or unfairness on the part of the attorney will prevent him from recovering for services rendered; * * * .'" Terry v. Bender, 143 Cal.App.2d 198, 300 P.2d 119, 129-30 (1956); In re Conrad, 340 Mo. 582, 105 S.W.2d 1, 10 (1937)("if an attorney seeks to secure personal advantage of his client, he is not entitled to any pay for his services"); Duffy v. Colonial Trust Co., 287 Pa. 348, 135 Atl. 204, 205 (1926)(entire fee disallowed where portion of services connected with fraud).

It would not have been requiring Knutsen "to do equity" to compel him to pay attorney fees to defendant Lenske; therefore, there was no error in excluding the issue from the case.

POINT 6. There was no error in the trial court's treatment of the issue whether Knutsen owed defendant Lenske for advances or services.

The last relatively specific point defendant Lenske urges under Assignment of Error No. 5 is that it was error for the trial court allegedly to have eliminated from the pretrial order the issue "Does Magner Knutsen owe money to Reuben Lenske for advances and/or services and if so what amounts?" (Lenske Br., 13).

As defendant Lenske admits (Lenske Br., 12), the final pretrial order included his contention that the subject property "was knowingly and advisedly conveyed by Magner Knutsen to the Heddons * * * as security to the Heddons and Reuben Lenske for any advancements in money or services as might be rendered or were rendered for the benefit of Magner Knutsen and that are unrecompensated advancements in services which were made and rendered pursuant to said agreement." (R-67, at 70). Issues of Fact were framed to cover the contention. Issue of Fact No. 2 inquired whether there was consideration for the deed (ibid.); Issue of Fact No. 3 asked whether Knutsen executed the deed "as security for advancement of money and/or services" (ibid.); and Issues of Fact Nos. 5 and 6 inquired whether there had been agreement between Knutsen and Lenske or Knutsen and Heddons that delivery of the deed was for advances and/or services (ibid.).

Although the foregoing contention and issues of fact, as set forth in the final pretrial order, do not follow the precise language suggested by defendant Lenske in his proferred issue, a reasonable reading of the material

can only yield the conclusion that it fairly covered the issue.

There was no reason for the court to have framed the issues more broadly than it did, because to do so would have opened the case to litigation over questions of alleged fees and advances having nothing to do either with the transaction or the occurrence or the property which was the subject of the original action. Such areas of inquiry, as previously observed, would extend defendant Lenske's cross-claim beyond the limits permitted by Rule 13(g), Fed.R.Civ.Proc. Moreover, in view of his having failed at any time in the case to give notice either of the amounts which he claimed or of the manner in which they could be ascertained, see pages 44 - 45, supra, it is difficult to understand by what manner of reasoning the court could be deemed to have erred in refusing to accept the open-ended contention.

In all events, regardless of the precise words used by the pretrial order to describe the issues, there can be no doubt that:

> 1. Defendant Lenske's extensive cross-examination of Knutsen was a clear effort to show that some of Lenske's money was used in behalf of Knutsen. The court and counsel specifically made reference to this attempt. (Tr.-I, pp. 141-43).
>
> 2. The essential thrust of defendant Lenske's long, narrative testimony (which never once was interrupted by objection) was the many supposed benefits as lawyer and benefactor he bestowed upon Knutsen. (Tr.-II, pp. 234-58).

That the court understood these matters of supposed fees for services and loans to be an issue certainly is clear from the fact that Finding of Fact No. 6 stated in relevant part: "There was no convincing proof of the amount or

value, if any, of legal services rendered or loans or advances made by defendant Lenske to defendants Knutsen * * * ." (R-at 79).

In short, the pretrial order adequately covered the issues raised by the Lenske contention; to have broadened the litigation would have been improper under Rule 13(g); and Lenske's own conduct at the trial and the resultant finding of fact show that both parties and the court understood the issues were before them. There was no error.

POINT 7. Defendant Lenske waived his right to have included in the pretrial order the matters which he claims were excluded.

In the first six points set forth above, we have attempted to show why, under applicable law, the trial court's exclusion of certain issues from the case was proper. In addition to these substantive reasons why there should be refusal of this Court to find error, we mention again the proposition that not including those issues in the pretrial order also was warranted by reason of defendant Lenske's voluntary refusal to attend pretrial conference. See Answer to Assignment of Error No. 2, supra.

ANSWER TO ASSIGNMENT OF ERROR No. 6

THE TRIAL COURT'S AWARD OF GENERAL AND EXEMPLARY DAMAGES WAS WARRANTED BOTH IN FACT AND LAW.

POINT 1. The award of general damages was proper.

In Oregon "the party guilty of fraud is liable for such damages as naturally and proximately resulted from the fraud. This is the universal rule." Selman v. Shirley, 161 Or. 582, 609, 85 P.2d 384 (1939). Typically, the real question in any case comes down to which damages were the "proximate result" of the fraud and which were not. Fortunately, the Oregon Supreme Court went further:

> "To facilitate its application the proximate result rule is often subdivided into four auxiliary rules: (1) A defrauded party is entitled to all out-of-pocket losses; * * * and (4) he is entitled to all consequential damages." 161 Or. at 615, 91 P.2d 312.

There should be no doubt that, under the evidence, the foreclosure of the government's mortgage was the direct and proximate result of defendant Lenske's fraud:

First. It bears worth repeating that Knutsen ceased making payments on the mortgage when he discovered, in January, 1965, that defendant Lenske would not reconvey the property. (Tr.-I, 58; Ex. 104). His stated reason for the cessation was that since Lenske would not reconvey, he did not want to "be just buying property for them," Lenske and record-owner Heddon. (Tr.-I, p. 59). Any doubt that, in truth, this was the reason for the default under the mortgage could arise only from a determination that Knutsen testified dishonestly. But that is not for this Court to do.

> "[T]he trial court's appraisal of

the credibility of the witnesses is to be accepted, no challenge to such appraisal being permissible in the appellate court. Appellants' attack upon the credibility of witnesses whose testimony was apparently accepted by the court will therefore be disregarded." Nuelson v. Sorenson, 293 F.2d 454, 460 (9th Cir., 1961).

Second. Defendant Lenske acknowledged that he had been informed by Knutsen that F.H.A. and the United States Attorney's office were concerned about title being in the Heddons' name and that they were pushing Knutsen in that regard. (Tr.-II, pp. 264, 266).

Third. The government certainly viewed cessation of mortgage payments as the reason for its foreclosure. (See complaint R-1, at 2, para. 6).

Taken together, this evidence shows rather clearly that the mortgage foreclosure was the direct result of the facts that (a) the government was unsuccessful in pushing Knutsen to recover title and (b) cessation of payments. The fraudulent deprivation of title is the only possible cause.

The damage suffered by the Knutsens because of foreclosure was two-fold:

(1) The foreclosure decree awarded the government judgment against Knutsen for $182.88 by way of costs. (R - 42, at 43).

(2) After the foreclosure decree, the Knutsens continued to occupy the subject property,

but as tenants[3] obliged to pay $220 for use of the land and $50 per month for occupancy of the house thereon. (Tr.-I, 60-61). Under the terms of his 10-month lease from the government, he therefore would have to pay $720 rent, none of which could apply against the principal of the government's judgment against him. (Ibid).

Whether viewed as out-of-pocket expenses or consequential damages, the total of court costs and rent certainly would not have had to be paid if the mortgage foreclosure, caused directly by defendant Lenske's fraud, had not occurred. Although Lenske claims there was no evidence of damages (Lenske Br., 14), we submit that when, by reason of another's fraud, the owner of land has to pay court costs resulting from foreclosure of his rights to the land, and when that owner's monthly payments, instead of going to reduction of the purchase price of the land are treated merely as rent, the owner necessarily has been damaged. Simply as a matter of logic, these damages, totalling $902.88, were proximately caused by and the natural consequence of fraudulent deprivation of the Knutsens' title. Compare Selman v. Shirley, supra, 161 Or. at 627:

> "But the wrongdoer is not the favorite of the law. The primary concern of the law of fraud is not to make the wrongdoer's position safe, and it has not formulated

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[3] The Knutsens could not continue to occupy their home in any status other than as tenants because they could not refinance and thereby redeem the property from the government. They attempted to refinance, but "couldn't get a loan anyplace, because the title wasn't in my name." (Tr.-I, p. 60).

its rule of damages in such a manner that as he plans his course of action he may know beforehand the amount of damages which he will be compelled to pay in the event his deceit is discovered. In fact, the great majority of the cases hold that the law of fraud is not concerned with his contemplations but with those of his victim. The proximate result and the natural consequences of the fraud are determined from the point of view of the victim as he contemplated his purchase." (emphasis supplied).

See also Chesapeake & Ohio Ry. Co. v. Elk Refining Co., 186 F.2d 30, 32-33 (4th Cir., 1950)(allowing injured party to recover rent paid for use of other property when he was deprived of use of his property which had been damaged).

The finding of the trial court manifestly was supported by the evidence and, in all events, "shall not be set aside unless clearly erroneous * * * ." Rule 52(a), Fed.R.Civ.Proc. As this Court has noted, "every intendment must be given the district court's findings, and especially so with respect to damages * * * ." United States National Bank v. Fabri-Valve Co., 235 F.2d 565, 568 (9th Cir., 1956).

POINT 2. The award of exemplary damages was proper.

Previously we answered the contention (Lenske Br., 14) that a so-called "equity court" could not award exemplary damages. (See pages 32-41, supra). But even though the trial court had power to award such damages, the question remains whether it was proper in this case. There were two bases for the award:

Fraud

Fraud, of course, may give rise to imposition of exemplary damages. See, e.g., Lewis v. Worldwide Imports, Inc., 238 Or. 580, 582, 395 P.2d 922 (1964)(seller represented automobile to be a demonstrator in new condition when, in fact, it had been seriously damages in an accident).

There should be no doubt that defendant Lenske defrauded the Knutsens, and the trial court's specific finding that he did (Finding No. 9) should not be set aside:

First. Lenske expressly admitted that deeding the property to the Heddons was his suggestion. (Tr.-II, p. 242).

Second. Lenske did not deny that, when he explained that the purported purpose of the conveyance was to put it beyond the reach of Knutsen's former wife, Knutsen told Lenske that he did not believe she would go after it, but Lenske thereupon insisted, "Well, we will just do it to be on the safe side." (Tr.-I, p. 49)(emphasis supplied).

Third. If, as defendant Lenske contended, the deed was to secure advances and/or legal fees, one would assume that he would have used a mortgage, the conventional method by which real property is given as security for a debt. There certainly was no reason to employ a warranty deed unless defendant Lenske wanted something more than security -- like to deprive his client of title. Any suggestion that a mortgage would not adequately protect his rights as a purported creditor because of fear Knutsen's former wife

would levy on the property are absurd, and, as an attorney, Lenske can be presumed to have known better.[4]

Fourth. There was no agreement that the property was to be conveyed as security either for loans or legal fees. The trial court so found. (Finding No. 6). Knutsen expressly denied existence even of any conversations with defendant Lenske about use of the property as security (Tr.-I, p. 52); he never was billed for services (ibid; II, p. 247); he neither requested, nor did Lenske offer to make any loans (Tr.-II, p. 139); and defendant Lenske, the man so cautious that he claims to have taken a warranty deed as security, never bothered with a promissory note or any other document to evidence the the existence or amount of the purported indebtedness (ibid). These facts are more than adequate support for the finding.

Fifth. In determining whether defendant Lenske committed fraud upon the Knutsens, it must be remembered that an attorney-client relationship existed. In those circumstances, the burden of proof was on Lenske to establish that he had not abused the relationship and that the transaction was not tainted by fraud. Phipps v. Willis, 53 Or. 190, 194-95, 96 Pac. 866 (1909).

Not only was this fraud, but the trial court properly found that it was willful and malicious. (Finding No. 9). We referred earlier to the fact that, in 1963, defendant Lenske deliberately gave lulling reassurances to

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[4] Under Oregon law, required monthly installments for child support do not become judgments until the installment accrues. Stephens v. Stephens, 170 Or. 363, 367-68, 132 P.2d 992 (1943). Therefore, had a mortgage been given and recorded in April 1962, subsequently maturing child support installments would be inferior to the mortgage lien. See Clarke - Woodward Drug Co. v. Hot Lake Sanatorium Co., 88 Or. 284, 292, 169 Pac. 796 (1918)(holding that even a mortgage on after-acquired property has priority over a judgment subsequent to mortgage recordation).

Knutsen that he would "look into" the matter of a reconveyance. (Tr.--I, p. 64). By his own testimony, he was still at it in 1965, when he claims to have told Knutsen that he, Knutsen, should tell the government that "there would be no problem involved so far as the property being reconveyed from the Heddons to him at the appropriate time * * * ." (Tr.-II, p. 251). He even had the fortitude to suggest to Knutsen's counsel, after this litigation commenced, "Use your efforts to get the Government to accept installment payments. * * * * Let him [i.e., Knutsen] pay that hundred dollars a month. He's not losing anything, and it's applying upon the balance owing." (Tr.-II, p. 254). Defendant Lenske was not content to deprive Knutsen of the title to the land; he obviously wanted him to pay off the mortgage as well.

Malfeasance of an Attorney

In deciding whether award of exemplary damages was proper, it must be remembered that this was more than a case of conventional fraud; it was fraud by an attorney upon his client.

Harper v. Interstate Brewery Co., 168 Or. 26, 120 P.2d 757 (1942) is a perfect example of the Oregon Supreme Court's affirmance of an award of exemplary damages by reason of malicious breach of duty. Defendants sold property pursuant to a power of sale contained in a deed given as security. Plaintiff sought compensatory and exemplary damages for defendants' breach for the "duty recognized both at law and in equity to act in good faith using all reasonable efforts to make the sale beneficial to the mortgagor by obtaining for the property the best price reasonably obtainable." 168 Or. at 40. The Court held:

> "The jury having found that defendant Gage acted maliciously and in disregard of the rights of the plaintiff, were also authorized under the evidence to impose

punitive damages against both the principal and the agent." 168 Or. at 51.

This case has prompted the observation that:

> "Once the court determined that the defendants owed the plaintiffs a duty to act in good faith, the court treated them in much the same way that it does a physician who is grossly negligent with a patient. That is, a failure to act in accordance with the higher duty cast upon a physician or a trustee is sufficient to subject him to exemplary damages even though the normally required malice or intent to injure may not be present." Hodel, "The Doctrine of Exemplary Damages in Oregon," 44 Or. L. Rev. 175, 217-18 (1965). (emphasis supplied).

Olson v. McAtee, 181 Or. 503, 182 P.2d 979 (1947) is one of the cases involving a physician which comes within the "higher duty" thesis of the commentator. There the Court observed:

> "Considering the character of the defendant's profession and the obligations it imposes, we think it needs no argument to support the conclusion that on this evidence, unexplained as it is by the defendant, the jury was warranted in finding him guilty of gross negligence and including in the verdict an award of punitive damages." 181 Or. at 520 (emphasis supplied).

The Oregon Supreme Court has not had occasion, to counsel's knowledge, to comment upon the propriety of awarding exemplary damages in a case, involving an attorney, such as is before this Court. However, in view

of its decision upholding such an award for a physician's grossly negligent breach of his duties, it is most reasonable to assume it would sanction the award in the case of an attorney's willful disregard of his duties as a member of the bar. Compare this Court's holding that Oregon law allows exemplary damages when it is determined that defendants "acted with wanton disregard of the property rights of [plaintiffs] or other aggravating circumstances, or recklessly so as to imply a disregard of social obligations or other improper motive." Reynolds Metals Co. v. Lampert, 324 F.2d 465, 466 (9th Cir., 1963), cert. den. 376 U.S. 910 (1964).

From these authorities it is fair to conclude that, both because of the fraud and the special relationship of the parties, it was proper for the court to award exemplary damages.

ANSWER TO ASSIGNMENT OF ERROR No. 7

THERE WERE NO ERRORS EITHER IN FINDINGS OF FACT OR CONCLUSIONS OF LAW

POINT 1. Finding of Fact No. 4 was supported by the evidence.

Defendant Lenske challenges Finding of Fact No. 4, that "in 1962, defendant Lenske, acting in his capacity as attorney for defendants Knutsen, induced defendants Knutsen to execute a warranty deed to the real property in question, which deed was recorded April 18, 1962 in the names of Harold E. Heddon and Hellen B. Heddon as grantees."

Exhibit 102, the deed, shows it to be in the names of the Heddons

as grantees and that it was recorded on April 18, 1962. Knutsen testified (Tr.-I, p. 49) and Lenske admitted (Tr.-II, p. 241) that the conveyance was suggested by Lenske. Lenske admitted that he was acting as Knutsen's attorney at the time of the conveyance. (Tr.-II, p. 264).

There was no error in making Finding of Fact No. 4.

POINT 2. Findings of Fact Nos. 5 through 9 were supported by the evidence.

Defendant Lenske also challenges Findings of Fact Nos. 5 through 9, inclusive.

We previously have set forth in considerable detail the facts concerning the conveyance at the suggestion of defendant Lenske and his and Heddons' refusal to reconvey. (Pages 2-5, 53-55, supra). Those facts more than adequately justify:

> Finding No. 5, that "there was no agreement between defendants Knutsen and defendant Lenske or between defendants Knutsen and defendants Heddon that the conveyance was to secure fees for legal services, loans or advances, either past or future;"
>
> Finding No. 7, that "neither defendant Lenske nor defendants Heddon have any valid claim either to the real property in question or to the right of redemption with respect thereto;"
>
> Finding No. 8, that "defendants Lenske and Heddon have failed and refused, after demand, to convey to defendants Knutsen whatever interest or

right they may have claimed with respect to said real property;" and

Finding No. 9, that "the acts and refusal to act of defendant Lenske, while he was attorney for defendants Knutsen, were a breach of fiduciary duties owed to defendants Knutsen and were willfully and maliciously committed for the purpose of fraudulently depriving defendants Knutsen of said real property and their right therein."

The same facts support also:

Finding No. 6, that "there was no convincing proof of the amount or value, if any, of legal services rendered or loans or advances made by defendant Lenske to defendants Knutsen, or of any consideration passing from defendant Lenske or any others to defendants Knutsen."

In addition to those facts, we also call to the Court's attention the following matters with respect to Finding No. 6:

First. Insofar as legal fees are concerned, defendant Lenske had no right to claim any because he defrauded his client. (See discussion at page 45, supra).

Second. Insofar as loans are concerned, Knutsen testified that he neither requested, nor did defendant Lenske ever offer to make any (Tr.-II, p. 139). Moreover, even Heddon admitted that he never loaned any money to Knutsen. (Tr.-II, p. 174). It may be that Heddon gave money to Lenske, but there is no evidence it was used for the benefit of Knutsen, much less at his request. True, Lenske disbursed funds for the account of Knutsen, but

they undoubtedly were the monies which Lenske, himself, owed on the Willark property he had purchased under contract from Knutsen. (See Tr.-II, p. 243, where Lenske admits he was the purchaser; II, p. 240, where Lenske claims the unpaid balance on the Willark property contract was $3,881). Knutsen testified he told Lenske that, out of the sums due on that contract, he wanted back child support payments satisfied and some money sent to Mrs. Cook, and that Lenske also said he would forward some payments to F.H.A. (Tr.-II, p. 153). In those circumstances, it is incredible that defendant Lenske would maintain the disbursements were from monies he borrowed from Heddon.

The questions of whether Knutsen owed money either for services or loans were part of defendant Lenske's case, and he had the burden of proof. ORS 41.210 (providing in relevant part that "the party having the affirmative of the issue shall produce the evidence to prove it."); ORS 41.240 (providing in relevant part that "each party shall prove his own affirmative allegations."). The issues were factual, and their resolution depended to considerable extent upon the credibility of the witnesses. That being true, the trial court's finding should not be set aside. Rule 52(a), Fed.R.Civ.Proc.; Nuelson v. Sorenson, 293 F.2d 454, 460 (9th Cir., 1961)(opinion quoted at pages 49-50, supra).

POINT 3. Findings of Fact Nos. 10, 11 and 12 were supported by the evidence.

Defendant Lenske challenges Findings of Fact Nos. 10 through 12. We previously have shown why, under the facts, the trial court

properly entered its Finding of Fact No. 10, that "defendants Knutsen did not discover or have reason to discover the fraud practiced upon them until 1965. (See pages 20-23, supra).

Similarly, we have set forth the facts which warranted Finding of Fact No. 11, that "as a direct and proximate result of the acts of defendant Lenske, defendants Knutsen have suffered general damages in the amount of $250.00" (see pages 49-52, supra), and Finding of Fact No. 12, that "defendants Knutsen are entitled to an award of exemplary damages against defendant Lenske in the amount of $5,000.00." (See pages 53-57, supra).

POINT 4. Conclusions of Law Nos. 2 through 6 were proper.

In view of the extensive discussion of both facts and law heretofore set forth, we submit that each and every of the trial courts Conclusions of Law were warranted by the facts and in accordance with governing rules of law.

ANSWER TO ASSIGNMENT OF ERROR No. 8

THERE WAS NO ERROR IN DENYING DEFENDANT LENSKE'S MOTION FOR NEW TRIAL.

POINT 1. There was no error in denying defendant Lenske leave to amend his motion for new trial.

The decree was entered on May 23, 1967. (TDE - 5/23/67). On June 1, 1967, defendant Lenske filed a motion for new trial (TDE - 6/1/67) which requested an additional thirty days from the date thereof within which to amend the motion for new trial. (R - 83).

Rule 59(b), Fed.R.Civ.Proc. provides that "a motion for new trial shall be served not later than 10 days after the entry of the judgment." By the terms of that rule, the time for filing a motion for new trial in this case would expires on June 2, yet the request for additional time, if allowed, would have permitted amendment at any time through June 30.

We submit that it would have been improper for the trial court to have permitted amendment after June 2. Rule 6(a),Fed.R.Civ.Proc. expressly provides that the trial court "may not extend the time for taking any action under Rules * * * 59(b) * * * except to the extent and under the conditions stated in them." Rule 59(b) makes no provision for extension of time or amendment. The rule is that a trial court may not grant a new trial for reasons not assigned in a motion made prior to expiration of the 10-day period. Russell v. Monongahela Ry. Co., 262 F.2d 349, 354 (3rd Cir., 1958)(original motion timely, but court refused to consider amendments). This Court's decision in Yanow v. Weyerhaeuser Steamship Co., 274 F.2d 274, 284 (9th Cir., 1959)("It may be considered an attempted amendment or enlargement of the earlier motion. Of course, the addition then of new grounds for the motion would be ineffective * * * .") appears to accord.

Even if, however, there was power to permit the amendment, it was a discretionary matter with the trial court. McCloskey v. Kane, 285 F.2d 297, 298 (D.C. Cir., 1960). There was no abuse of the discretion since the trial judge and the parties had just sat through the trial, which lasted only two days, and therefore can be assumed to have had matters reasonably

fresh in their minds so as not to need a transcript; the transcript was not finished until August 28, 1967 (Tr.-II, p. 286), so defendant Lenske would not have had it available to him within the additional time he requested; and the motion as it was, was lengthy and went into considerable detail without benefit of a transcript. In this regard, even the matters raised in defendant Lenske's brief on appeal add nothing of substance to the motion for new trial he filed.

POINT 2. There was no error in denying the motion for new trial.

The action of the trial court in denying a motion for new trial "will not be disturbed on appeal except in case of plain abuse of discretion." Francis v. Southern Pacific Co., 162 F.2d 813, 818 (10th Cir., 1947), affirmed 333 U.S. 445 (1948). Bearing in mind the facts and law discussed heretofore, and in view of the harmless error rule of Rule 61, Fed.R.Civ.Proc., there was no abuse of discretion in denying defendant Lenske's motion for new trial.

ANSWER TO ASSIGNMENT OF ERROR NO. 9

The ninth assignment of error is nothing of the sort. Rather, it is a collection of attacks upon the credibility of Knutsen, the sincerity of his counsel and the government and the fairness of the trial court.

We already have noted that the trial court resolved the credibility issue in favor of Knutsen and that, under Rule 52(a), Fed.R.Civ.Proc., and

this Court's holding in Nuelson v. Sorenson, 293 F.2d 454, 460 (9th Cir., 1961), such is not a permissible issue on appeal. Moreover, review of the facts in this case, especially insofar as they relate to defendant Lenske's fraud, suggest, we submit, that it ill becomes him to say very much about the subject of credibility.

The charge (Lenske Br., 23) that Knutsen and his counsel collaborated with the government in some sort of vendetta against defendant Lenske is wholly unsubstantiated. Whatever may be his grievances against the United States Attorney's office or any other branch of government, the suggestion that Knutsen's counsel joined in a "probing of how to get at" him is emphatically denied. The government, after all, was the party who sought and secured foreclosure of the Knutsens' interest in their property. It was not a party to the cross-claim, which was prosecuted by Knutsen and his counsel for reasons which, in view of the findings below, are self-evident.

Finally, we respectfully suggest that the accusation that the trial judge was unfair is totally baseless. Review of the transcript shows that, to the contrary, he demonstrated extreme patience and leniency with defendant Lenske.[5] Unhappiness with a judge's decisions is no excuse for making unfair attacks upon him.

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[5] E. g. : Allowance of Lenske's motion to add new defense raised for the first time on the day before trial (Tr.-I, p. 17); ordering Knutsen's counsel to surrender and permit Lenske to use documents Knutsen's counsel had sealed and reserved for impeachment (Tr.-I, pp. 82-83); allowing Lenske relief from Local Rule 36, requiring all exhibits to be marked for identification prior to trial (Tr.-I, pp. 117-121); allowing Lenske to introduce testimony of expert witness, notwithstanding the fact that, contrary to the trial court's prior order, Lenske had failed to disclose his identity to Knutsen's counsel. (Tr.-II, pp. 275-76).

CONCLUSION

There were no errors below. The decree and judgment should be affirmed.

Respectfully submitted,

KEANE, HAESSLER, BAUMAN and HARPER

By
Donald H. Pearlman

Attorneys for Appellees

CERTIFICATE UNDER RULE 18(2)

I hereby certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DONALD H. PEARLMAN

Of Attorneys for Appellees

PROOF OF SERVICE

I hereby certify that I served Reuben G. Lenske, appellant herein appearing pro se, with three true and correct copies of the within Appellees' Brief, by mailing such copies to said Reuben G. Lenske at 1014 S. W. Second Avenue, Portland, Oregon 97204, his last address shown on any document served by him upon appellees' counsel in this appeal; that said copies were certified by me to be true and correct copies of the original; that said copies were placed in a sealed envelope addressed to Reuben G. Lenske, with the postage thereupon prepaid; and that said envelope was deposited in the United States Post Office, Portland, Oregon on March 18, 1968.

Donald H. Pearlman
Of Attorneys for Appellees

APPENDIX "A"

RULE 36 - CIVIL RULES

RULES OF THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

"(a) When a pretrial conference is held:

"(1) Each party shall disclose to all others and permit examination of all exhibits which he expects to offer in evidence at the trial, except those which are to be used solely for impeachment or in rebuttal or to refresh recollection and they may be sealed.

"(2) Unless so disclosed, no exhibits shall be received in evidence at the trial unless the adverse party consents or the Court finds that substantial prejudice might result from the exclusion of such exhibits and that there was reasonable ground for failing to disclose such exhibits prior to trial.

"(3) All exhibits shall be marked for identification at least one day prior to the trial and shall be listed in the pretrial order.

"(b) When no pretrial conference is held, exhibits shall be disclosed to all other parties not later than two days prior to trial."

APPENDIX "B"

EXCERPTS FROM STATUTES OF OREGON

ORS 12.040(1)

"A suit shall only be commenced within the time limited to commence an action as provided in this chapter; and a suit for the determination of any right or claim to or interest in real property shall be deemed within the limitations provided for actions for the recovery of the possession of real property."

ORS 12.040(4)

"In a suit upon a new promise, fraud or mistake, the limitation shall only be deemed to commence from the making of the new promise or the discovery of the fraud or mistake."

ORS 12.050

"An action for the recovery of real property, or for the recovery of the possession thereof, shall be commenced within 10 years. No action shall be maintained for such recovery unless it appear that the plaintiff, his ancestor, predecessor, or grantor was seised or possessed of the premises in question within 10 years before the commencement of the action."

ORS 12.110(1)

"An action for * * * any injury to the person or rights of another, not arising on contract, and not especially enumerated in this chapter, shall be commenced within two years; provided, that in an action at law based

upon fraud or deceit, the limitation shall be deemed to commence only from the discovery of the fraud or deceit."